No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATLANTIC REFINING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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CITATIONS

Statutes—Continued

Miscellaneous:

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OPINION BELOW

No opinion was rendered by the United States District Court for the District of Columbia. The oral statements made by the court in denying the Government's motions are set forth at pages 178–179, 201, and 275–276 of the record.

JURISDICTION

The orders of the district court were entered on March 25 and March 26, 1958 (R. 180–181, 202, 276–277). The notice of appeal was filed in that court on May 24, 1958 (R. 20–21), and probable jurisdiction was noted on October 13, 1958 (R. 22). The jurisdiction of this Court to review the orders on

direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, 49 U.S.C. 45, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, and the Elkins Act, 49 U.S.C. 41, *et seq.*, are set forth in the Appendix, *infra*, pp. 44-48.

QUESTION PRESENTED[1]

The Government's complaint in a suit under the Interstate Commerce Act and the Elkins Act charged that common carrier pipeline companies had departed from published tariffs and had given illegal rebates through the payment of dividends to their oil company owners, which also were their principal shippers. A consent judgment entered in the case prohibits the carriers from paying any dividends to a shipper-owner "which in the aggregate [are] in excess of its share of seven percentum (7%) of the valuation of such common carrier's property * * *."

The question presented is whether a shipper-owner's "share" of 7% of the common carrier's property valuation is limited to that proportion of 7% of such valuation which represents the ratio of the shipper-owner's investment in the carrier to the carrier's total invested capital, including long-term debt.

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[1] For the reasons set forth *infra*, p. 6, the second and third questions presented in our jurisdictional statement are no longer being contested and therefore are not argued here.

STATEMENT

On December 23, 1941, the United States filed a civil action under Section 3 of the Elkins Act (49 U.S.C. 43) against 20 major oil companies, 7 affiliated oil companies, and 52 common carrier pipeline subsidiaries of the oil companies, charging violations of the Elkins and the Interstate Commerce Acts. The complaint (R. 1-9) alleged (Pars. 6 and 7, R. 6-7) that the defendant shipper-owners (the oil companies) were paying the applicable tariff rates filed with the Interstate Commerce Commission by the pipelines for transportation of petroleum products, but were receiving refunds, rebates and offsets against regular tariff charges which were "passed on or credited, directly or indirectly, by the defendant common carriers to their defendant shipper-owners under the guise of dividends and earnings * * *." The complaint sought injunctive relief and treble damages (R. 7-9).

On the same day, a consent judgment was entered (R. 9-15). The judgment [2] prohibits any of the pipeline defendants from crediting or paying in any calendar year (commencing January 1942) to any shipper-owner any earnings, dividends, sums of money or other valuable considerations "which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's prop-

[2] The judgment recites that it was entered "without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue and in final settlement of all claims herein in issue" (R. 9).

erty * * *" (R. 10). The judgment further provides (*ibid.*) that "[v]aluation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission".

The 1941 suit and the consent judgment which settled it developed from a prior case brought by the Government against the oil industry in September 1940. *United States* v. *American Petroleum Institute, et al.*, (D. D.C., Civil No. 8524). The history of the negotiations leading to the 1941 case is set forth in a memorandum submitted to the House Antitrust Subcommittee by Charles I. Thompson, counsel for Atlantic Refining Co., who was present and took part in the negotiations. See Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, Part I, 85th Cong., 1st Sess., pp. 1262–1269.

The 1940 suit, known in the oil industry as the "Mother Hubbard" case, alleged violations of Sections 1, 2 and 3 of the Sherman Act, Sections 2 and 3 of the Clayton Act, Sections 2 and 6 of the Interstate Commerce Act, and Section 1 of the Elkins Act. *Id.*, pp. 146, 148. Supplemental suits were filed against Phillips Petroleum Co., Great Lakes Pipe Line Co., and Standard Oil Co. (Ind.), alleging specific violations of the Elkins Act, and seeking treble damages. *Id.*, p. 1263.

On January 29, 1941, representatives of the Department of Justice and the industry met "to discuss a broad economic solution of the issues raised in that

[Mother Hubbard] case and the collateral pipeline cases." *Ibid.* In July of 1941, following the declaration of a national emergency, it was agreed that the Department and the industry would increase their efforts to settle the Elkins Act claims. At that time, the Department agreed to negotiate on the basis of obtaining "a court consent decree in a new Elkins Act suit * * * which would contain an adjudication that a fair and reasonable dividend rate was not a violation of the act and release the Elkins Act damage claims." *Id.*, p. 1267. Thereafter proposed decrees were drafted and discussed and "redrafts were prepared for discussion with the [Department] staff." *Id.*, p. 1269. The *Atlantic Refining* complaint was filed and the consent decree was entered on December 23, 1941, at which time the previous Elkins Act suits were dismissed. No further proceedings were had in the "Mother Hubbard" suit; it was dismissed by the Government in 1951. *Id.*, p. 33 (testimony of Assistant Attorney General Hansen).

On October 11, 1957, the Government instituted four proceedings against different defendants for construction of various provisions of the 1941 consent judgment. Three proceedings were in the form of motions for carrying out the judgment; the fourth was a petition for civil contempt, which was terminated on February 12, 1958, through entry of a consent order.

After hearing, the district court denied the three motions, and granted other relief.[3]

The Government appealed from the denial of its motions and the granting of such relief (R. 20–21),

[3] See R. 178–181, 201–202, 275–277.

and this Court noted probable jurisdiction on October 13, 1958 (R. 22). However, on March 10 and 12, 1959, respectively, the Government entered into stipulations with appellees Tidal Pipe Line Company and Tidewater Oil Company and with appellees Service Pipe Line Company and Standard Oil Company (Indiana) which are being filed herewith, together with motions to remand. As a result, the questions involved in the Tidal and Service motions are no longer being contested. Accordingly, this brief discusses only the remaining question involved in the Arapahoe motion.

THE ARAPAHOE MOTION

Arapahoe Pipe Line Company ("Arapahoe") was organized in 1954 by the Sinclair Pipe Line Company ("Sinclair") and The Pure Oil Company ("Pure") (R. 26, 34). Arapahoe is a common carrier under the judgment and Sinclair and Pure are both shipper-owners (*ibid.*). Pure and Sinclair each invested $1,450,000 in Arapahoe's capital stock (*ibid.*). Thereafter, Arapahoe issued $26,000,000 in 3.8% 25-year bonds to an insurance company (R. 26, 35).

The Government's motion, filed on October 11, 1957 (R. 23–28), alleged (R. 27–28) that because Arapahoe had "failed to deduct from the valuation of its common carrier property, before computing its shipper-owners' permissible dividend, the share of the valuation of the company's carrier property financed by or attributable to the aforesaid loans of $26,000,000 from

third parties," it "has computed dividends for its shipper-owners in excess of its shipper-owners' share of 7% of the valuation of Arapahoe's property in violation of the judgment." The motion stated (R. 27-28) that reports which Arapahoe had filed with the Attorney General (as required by the judgment) reported "allowable dividends" of $1,526,495 and $2,-109,569 available for distribution to stockholders for the calendar years 1955 and 1956, respectively; and that such dividends would constitute returns for those years of 52.6% and 72.7%, respectively, on the shipper-owners' investment of $2,900,000.

The relief sought (R. 28) was that Arapahoe be directed, "before computing the permissible dividends for its shipper-owners, to deduct from the valuation of its property owned and used for common carrier purposes the share of such valuation that is the result of or attributable to monies obtained by the carrier from third parties for extending existing or constructing or acquiring new common carrier facilities * * *," and "for such other and further orders as may seem appropriate and necessary to the Court."[4]

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[4] The Government's motion for an order carrying out the judgment against Arapahoe was opposed not only by the latter but also by (1) twelve other common-carrier pipeline defendants which, under a court-approved stipulation, were "parties in interest in such proceedings" (R. 90-91); and (2) Interstate Oil Pipe Line Company ("Interstate") and Tuscarora Pipe Line Company, Limited ("Tuscarora"), also common-carrier defendants. The latter two companies filed a petition "to confirm rights" under the judgment (R. 92-95); and

In denying the motion, the district court held (R. 178) that "this decree is clear upon its face," and that it therefore had "no right to rewrite the agreement reached between the respective parties after due deliberation and approval by the Court in 1941 and again in 1942 by the supplemental order."[5] The court further ruled that "even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years [since entry of the decree]."[6]

SUMMARY OF ARGUMENT

Paragraph III of the consent judgment in this case provides that no defendant pipeline common carrier shall pay to any oil company shipper-owner any an-

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a motion to dismiss the Government's motion, which also sought a declaration that the defendants properly had construed the judgment (R. 95–97). Interstate, Tuscarora, and the twelve other common-carrier defendants are active parties appellee before this Court.

[5] In 1942 a supplemental order, entered on consent, authorized Great Lakes Pipe Line Company (one of the common carriers that was a party to the judgment) to refinance its outstanding debt. Great Lakes was one of the four defendant pipeline companies which had outstanding debt when the judgment was entered. See *infra*, pp. 40–41.

[6] The defendants contended (R. 46–49, 93, 113, 126–127, 145–146, 148–155, 167–172) that the Government had "acquiesced" in their construction of the judgment because, in reports filed with the Attorney General since 1941 (as the judgment required), the common carriers had calculated permissible dividends on the basis of seven percent of the carrier's total valuation, and the Attorney General had not objected thereto and, indeed, allegedly had concurred therein. This alleged "acquiescence" is discussed *infra*, pp. 33–43.

nual dividends derived from common-carrier services "which in the aggregate [are] in excess of its [shipper-owner's] share of seven percentum (7%) of the valuation of such common carrier's property * * *." Valuation is defined as "the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission." The Government contends that the shipper-owner's "share" of the carrier's valuation is the proportion which its investment in the carrier bears to the latter's total invested capital (including debt owed to third persons) and not, as appellees contend and the district court held, its proportionate share of total outstanding capital stock.

A. Although the district court held (R. 187) that the decree is "clear upon its face," we submit that the phrase "share of * * * valuation"—if regard be had to the words alone—may refer either to shares as between stockholders (as appellees contend), or between stockholders on the one hand and creditors on the other. This textual ambiguity is properly to be resolved, the Government urges, by looking to the complaint, the purpose of the statute, and the over-all design of the judgment.

1. Construing the judgment in the light of the purposes of the Elkins and Interstate Commerce Acts (under which the complaint was filed) and the allegations in the complaint, we submit that it was intended to limit shipper-owners to a seven-percent return on investment and not, as appellees contend, to allow a seven-percent return on total valuation.

The complaint alleged that any payment of dividends by the pipelines to their shipper-owners constituted illegal rebates prohibited by the Elkins and Interstate Commerce Acts. The case was settled, however, by a provision limiting permissible dividends to seven percent. In the light of the charges in the complaint, and the protracted negotiations which led to the consent judgment, the seven-percent dividend limitation must be viewed as representing a compromise between the Government and the defendants by which (1) the shipper-owners could receive a fair return on their investment in the pipelines, and (2) the non-owner shippers would be protected against the unfair competitive advantage which the shipper-owners might gain over them through receipt of dividends amounting to far higher returns on their investment—for example, the 50- or 70-percent return on investment which Arapahoe's shipper-owners could receive under appellees' construction of the judgment. In other words, to the extent that permissible dividends did not exceed a reasonable return on investment, the judgment analogized them to the shipper-owners' investment in any other business where they did not occupy the dual position of shipper and owner. However, since dividend payments in excess of a reasonable return on investment would, as a practical matter, have the effect of constituting an offset to the rates paid by the shipper, they were prohibited as akin to rebates, condemned by the Elkins and Interstate Commerce Acts.

2. Contrary to appellees' assumption, limiting a shipper-owner to a seven-percent return on investment

would not deprive it of the benefit of capital borrowed by the carrier. As construed by the Government, the dividend limitation does not prevent a carrier from borrowing money or from retiring any indebtedness incurred. Its effect is only that the creation of indebtedness reduces the shipper-owner's share of permissible dividends based on the increased valuation until such indebtedness is paid off. After that occurs, however, the shipper-owners may enjoy the benefits of higher permissible dividends resulting from the increased valuation.

The reason that the judgment used the phrase "share of seven percentum (7%) of the valuation" instead of providing for a seven-percent return on investment was in order to compensate for changes in the purchasing power of the dollar due to inflation or other marketing conditions. In other words, since the value of an "investment" changes in accordance with changes in the value of the underlying property which it represents, a fixed return on book value would not constitute a true measure of a fair return on investment. By permitting the shipper-owner to receive its "share" of seven percent of valuation, as we have defined such "share," the judgment provides a seven-percent return on the shipper-owner's investment adjusted to reflect its present market value.

3. Other provisions of the judgment also support the Government's contention that it permits shipper-owners only a seven-percent return on their adjusted pipeline investment. When the judgment was entered, the Commission in valuing pipelines treated property "owned and used" as a separate category

from property "used but not owned," even though it included both categories in the carrier's over-all valuation for rate-making purposes. The fact that the judgment permits only property "owned and used" to be included in valuation in computing permissible dividends indicates that shipper-owners are not to receive a return on property not attributable to their investment. For if the judgment were merely designed to limit the shipper-owner to a seven-per-cent return on the carrier's total valuation as made by the Commission, there would be no reason for excluding from valuation leased property which the Commission itself includes.

B. Appellees' construction of the judgment would make the dividend limitation completely ineffective for accomplishing the purpose for which the suit was brought. It would enable a shipper-owner's permissible return on investment to be substantially increased whenever there was a significant increase in the carrier's debt. But the discriminatory effect upon a non-owner shipper of permitting a shipper-owner to receive unduly high dividend returns on its investment is no less because the carrier has increased its outstanding debt. For the injury to the non-owner shipper results from the fact that part of the shipper-owner's transportation costs may be returned to it indirectly in the form of dividends, and thus the shipper-owner may obtain transportation at a lower ultimate cost than the non-owner. In the instant case, the effect of appellees' construction of the judgment is to permit Arapahoe, only three years

after its organization, to pay dividends to its shipper-owners of approximately 70 percent on investment. In terms of preventing rebates, a dividend limitation which permits such a return is a practical nullity.

C. The Government's alleged acquiescence in appellees' interpretation of the judgment should not bar it from obtaining the relief here sought.

1. The facts that during the period 1942 to 1957 a number of pipeline companies filed reports with the Attorney General which indicated that they were calculating permissible dividends on the basis of a return of seven percent on valuation, and that the Department of Justice did not challenge those reports, do not justify the inference that the Department agreed with the defendants' construction of the judgment. The non-action by the Department was rather due in part to its changing views as to the best method of handling the complex enforcement questions which the judgment presented, and in part to preoccupation with other enforcement problems under the decree besides the "share of 7% of valuation" clause.

In view of the many difficult enforcement problems which the judgment presented, we do not believe that the Government's failure to question the correctness of the reported permissible dividends fairly can be equated with affirmative approval thereof. We submit that Government acquiescence in a construction of a judgment designed to prevent rebates, which construction would result in making the judgment a practical nullity in achieving that end, should

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not be implied unless there has been a clear and unequivocal affirmative statement by the Department concurring in such construction. No such statement was made here.

Nor can the Government's consent in 1942 to an order approving a recapitalization plan of appellee Great Lakes Pipe Line Company fairly be said to show its acquiescence in the industry's construction. Both the petition seeking approval of the plan and the court's order of approval expressly stated that approval was limited to "the specific plan set forth herein" (R. 139-140, 143). The Government, therefore, consented only to the particular transaction there involved; it did not generally acquiesce in appellees' construction of the judgment.

2. If, as we believe, appellees are not properly applying the judgment now, the Government's failure to act sooner cannot bar it from obtaining relief in a proceeding designed to further the public interest. For principles such as "acquiescence, laches, or failure to act," which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. *United States* v. *California,* 332 U.S. 19, 39-40.

The Government is here seeking only to have its interpretation of the judgment given prospective effect in order to achieve the public purpose of protecting non-owner shippers from competitive injury. Appellees have not shown that such prospective application would either prejudice them or result in unfair treatment.

ARGUMENT

THE JUDGMENT LIMITS THE SHIPPER-OWNER TO A SEVEN-PERCENT RETURN ON ITS INVESTMENT IN THE CARRIER: IT DOES NOT AUTHORIZE A RETURN TO IT OF SEVEN PERCENT OF THE CARRIER'S TOTAL VALUATION

Paragraph III of the judgment (R. 10) provides that no defendant common carrier shall credit, give, grant, or pay, directly or indirectly, to any shipper-owner in any calendar year, any earnings, dividends, sums of money, or other valuable considerations derived from transportation or other common-carrier services

> which in the aggregate is in excess of its [the shipper-owner's] share of seven percentum (7%) of the valuation of such common carrier's property * * *.

Valuation is defined (*ibid.*) as "the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission."

The Government contends that the shipper-owner's "share" of the carrier's valuation is the proportion which its investment in the carrier bears to the latter's total invested capital (including debt owed to third persons) and not, as appellees contend and the district court held, its proportionate share of total outstanding capital stock. In computing the ratio of shipper-owner investment to total invested capital, we use the book value[7] of the shipper-owner's stock as its

[7] The book value of the shipper-owner's stock is computed by dividing the sum of the capital and surplus accounts on the

investment, and the sum of the capital stock, surplus, and indebtedness accounts on the carrier's books as the carrier's total invested capital.

A simple illustration will make clear the respective positions of the Government and of appellees. Assume that two shipper-owners have invested $1,000,000 each in the capital stock of a pipeline, that the pipeline has issued $18,000,000 in long-term funded debt, and that the present valuation of the pipeline made by the Interstate Commerce Commission is $22,000,000. Under the Government's construction of the judgment, the "share" of each shipper-owner would be calculated as follows: the permissible dividends would be 7% of the total valuation of $22,000,000, or $1,540,000. However, each shipper-owner's "share" of that amount would be the relationship of its total investment of $1,000,000 to the total invested capital of $20,000,000, or one to twenty. The maximum dividends which each carrier could pay or credit, therefore, would be 1/20th of $1,540,000, or $77,000. However, under appellees' construction, which the district court adopted, each shipper-owner could receive one-half of 7% of the total valuation of $22,000,000, or an annual dividend

carrier's books by the proportion which each shipper-owner's stock bears to the total stock outstanding. However, accumulated earnings in excess of seven percent of valuation, which are required to be retained by the carrier in a restricted surplus account (see *infra*, p. 25), must be excluded from this computation, since the judgment contemplates that such "excess" earnings should not be included in the computation of dividends. See *infra*, pp. 29–30.

of $770,000 on its investment of $1,000,000—a return of 77%.[8]

We submit that the judgment was not intended to permit such an anomalous result. On the contrary, we shall show that, viewed in the light of the complaint, the purpose of the statute, and the over-all design of the judgment, the phrase "share of seven percentum (7%)" of the carrier's valuation was intended to limit the shipper-owner to a seven-percent return on investment, with appropriate adjustments to reflect changes in the value of investment resulting from changes in the valuation of the carrier's property. We shall further show that appellees' construction of the phrase, which would permit the shipper-owners to receive dividends which bear no relation to any fixed return on their investment, would violate the basic plan of the judgment, and would permit continuation of the very discriminatory and preferential practices which the original suit was designed to correct and which the judgment was intended to eliminate.

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[8] In the district court, the Government's petition to enforce was directed against Arapahoe, which had only recently been incorporated and the indebtedness of which was incurred shortly after organization. In the circumstances, the simplest method of computing the shipper-owner's share was, as the Government's prayer for relief proposed, to have Arapahoe, "before computing the permissible dividends for its shipper-owners, * * * deduct from the valuation * * * the share of such valuation that is the result of or attributable to monies obtained by the carrier from third parties * * *" (R. 28).

A. THE BASIC PLAN OF THE JUDGMENT IS TO IMPOSE A LIMITATION IN TERMS OF THE SHIPPER-OWNER'S RETURN ON INVESTMENT

Although the district court held (R. 178) that the decree is "clear upon its face," we sumbit, as, indeed, one of the appellees itself recognized in 1950,[9] that the phrase "share of * * * valuation" may refer either to shares as between stockholders (as appellees contend), or between stockholders on the one hand and creditors on the other. The ambiguity of the phrase is apparent when it is contrasted with the language employed in connection with the Great Lakes supplemental order (see *infra*, pp. 40–41), where the phrase "shipper-owners' proportion" was explicitly defined to "mean the proportion which the shares of stock of your petitioner owned by shipper-owners * * * shall bear to all shares of stock of your petitioner outstanding * * *" (R. 139).

The meaning of the judgment, therefore, "is * * * to be determined * * * upon an examination of the issues made and intended to be submitted and what

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[9] In a memorandum presented to the Department of Justice in 1950, in support of its filing of amended reports under the decree, appellee Service stated:

"*The meaning of 'its share' in paragraph III of the decree*

"Paragraph III of the decree permits payment of earnings, dividends, etc., to a shipper-owner not in excess of 'its share of 7 percent of the valuation' of the common carrier's property. To what does 'its share' refer? Does it refer to shares as between owners or stockholders, in which case the shipper-owner owning 100 percent of the stock of the carrier would have the whole share, or does it refer to shares as between owners and nonowners, such as lending agencies which have loaned funds to the business? [Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, Part I, 85th Cong., 1st Sess., p. 294.]"

the decree was really designed to accomplish." *Mayor and Aldermen of Vicksburg* v. *Henson,* 231 U.S. 259, 273; *Hendrie* v. *Lowmaster,* 152 F. 2d 83 (C.A. 6). Moreover, "where * * * the language of the judgment [is] ambiguous, the statute may be looked to in aid of [interpreting] the judgment." *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.,* 137 F. 2d 871, 885 (C.A. 6), certiorari denied, 320 U.S. 800.[10]

1. *Construing the judgment in the light of the purposes of the Elkins and Interstate Commerce Acts and the allegations in the complaint, its intendment was to limit shipper-owners to a seven-percent return on investment.*—The complaint in this case alleged that any payment of dividends by the pipelines to their shipper-owners constituted illegal rebates prohibited by the Elkins and the Interstate Commerce Acts (R. 6–7), and sought injunctive relief and treble damages (R. 7–9). Although appellee Arapahoe now states (Motion to Affirm, p. 24) that the oil industry "has always viewed the Government's rebate theory as a legal fantasy which any court would reject if the issue came to trial," the defendants apparently were not so sanguine with respect to their prospects of

[10] The district court itself looked "at the language and purpose of the decree as a whole" (R. 201) in construing the provisions involved in the Government's motion against Service (R. 183–187). It concluded (R. 201) that Service's interpretation would do no "violence to the decree as a whole," even though "a literal construction of a few words * * * may, in my judgment, put some doubt on the construction followed by Service and Standard."

success when the suit was filed.[11] They elected not to contest the case on the merits, but instead settled it by a consent judgment which, without adjudicating any of the issues, imposed a seven-percent dividend limitation. The judgment was the product of protracted negotiations between the Government and an industry committee.[12] In these circumstances, the settlement reflected in the judgment must be deemed to have been intended to provide a dividend policy for shipper-owned pipeline companies which would be consistent with the prohibitions against preferential discriminations in the Elkins and Interstate Commerce Acts. The question is whether, in the light of these statutory purposes and the theory of the complaint, the dividend limitation was framed in terms of a return on the shipper-owners' pipeline investments, or whether it was merely designed to impose a limitation based on the carrier's return on its total invested capital.

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[11] In testimony before the House Antitrust Subcommittee in 1957, Charles I. Thompson, counsel for appellee Atlantic Refining Co., stated that "a number of sound and experienced lawyers, including Colonel Klein [head of the industry negotiating team], threw out a note of caution that judicial reaction to novel theories [was] not * * * predictable." Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, Part I, 85th Cong., 1st Sess., p. 1250. Mr. Thompson further stated that "[t]here was no doubt that Mr. Arnold * * * and his staff took this novel theory pretty seriously, and they were prepared to push it to an early decision" (*ibid.*). The treble damages sought by the Government were "perhaps, a $2 billion claim" (*id.* at p. 1258). The consent decree was entered "in final settlement of all claims herein in issue" (R. 9).

[12] *Id.* at pp. 1262–1269.

The basic Congressional policy reflected in the Elkins Act, and in the anti-discrimination provisions of the Interstate Commerce Act, is that all shippers are to be treated alike and that carriers cannot give some shippers more favorable treatment than others. See *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 461–462. While it is true, as appellees assert, that no case has held that the payment of dividends, as such, is a rebate, dividends obviously may be a "device" by which a carrier can give a shipper an illegal preference. For where some shippers have an ownership interest in a carrier, whereas other shippers using the same carriers do not, the former will obtain a competitive advantage over the latter to the extent that part of the money paid by them for transportation charges is returned as dividends. In such a situation, the shipper-owner would obtain a further competitive advantage from the fact that a portion of the dividends paid to him is derived from profits realized from the shipment of the competitor's goods. "[T]he [Elkins] act seeks to reach all means and methods by which the unlawful preference or rebate * * * is * * * received." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 71–72; cf. *Ohio Tank Car Company* v. *Keith Railway Equipment Company*, 148 F. 2d 4 (C.A. 7).

In the light of the Government's claim in the complaint that the Elkins Act prohibited the payment of any dividends by the pipelines to their shipper-owners, and the policy of that Act to ban "all means and methods by which the unlawful preference or rebate * * * is * * * received" (*Armour Packing* case,

supra), we submit that the seven-percent dividend limitation in the judgment represented a compromise between plaintiff and defendants by which (1) the shipper-owners could receive a fair return on their investment in the pipeline, and (2) the non-owner shippers would be protected against the unfair competitive advantage which the shipper-owners might gain over them through receipt of dividends amounting to far higher returns on their investment—for example, the 50% or 70% return on investment which Arapahoe's shipper-owners could receive under appellees' construction of the judgment (see *supra*, p. 7). Appellees' theory that the judgment was merely intended to limit the shipper-owners to a seven-percent return on the carriers' valuation would make the judgment of no practical significance in preventing the discriminatory practices which the suit was designed to eliminate.

A reasonable return on the shipper-owner's investment could be considered as paying the "cost" of the capital employed rather than as offsetting the transportation rates paid. Compare Section 15(13) of the Interstate Commerce Act, 49 U.S.C. 15(13), which permits a shipper to receive "just and reasonable" payment for services which it furnishes to the carrier. Or, to put it differently, to the extent that dividends did not exceed a reasonable return on investment, they were analogized to the oil companies' investments in any other business, where they did not occupy the dual position of shipper and owner. However, dividend payments in excess of a reasonable return on investment would, as a practical mat-

ter, have the effect of constituting an offset to the rates paid by the shipper and would therefore result in the discriminations prohibited by the Elkins and Interstate Commerce Acts.

To repeat, the settlement reflected in the judgment must be viewed as a compromise between the Government and the defendants by which the shipper-owners (1) were permitted to obtain a fair return on their pipeline investment (*i.e.*, 7%) and (2) tacitly agreed that returns of greater than seven percent would give them an unfair preference over other shippers, and therefore were to be prohibited as rebates.

2. *The shipper-owner's "share" of seven percent of the carrier's valuation is the ratio between its capital investment in the pipeline and the latter's total valuation.*—The Government's interpretation of the judgment effectuates this compromise by insuring that the seven-percent return is computed on the basis of the shipper-owner's investment in the carrier rather than on the basis of the carrier's total valuation. Our interpretation essentially seeks to eliminate, in the computation of shipper-owner dividends, an amount attributable to the earning power of debt capital as long as that debt is outstanding. The assets underlying the carriers' valuation, and hence its earning power, may come from several sources other than shipper-owner investment. The major source of outside capital, however, is third-party indebtedness and it is only when earnings from that capital are excluded that the return allowed approximates a seven-percent return based on the shipper-owners' investment in the carrier.

This does not mean, as appellees erroneously assume, that limiting a shipper-owner to a seven-percent return on investment would deprive it of the benefit of capital borrowed by the carrier. The shipper-owner is adequately compensated for any additional risks which it incurs in connection with the creation of the pipeline company's debt (such as, for example, by directly guaranteeing the loan to the carrier[13] or by allowing the assets underlying its stock interest to be encumbered) through the increase in permissible dividends which occurs as the indebtedness is retired. When capital is borrowed by the carrier and invested in common carrier facilities, there is an immediate increase in the carriers' total valuation and, under the judgment, a corresponding increase in the total amount of permissible dividends. The shipper-owners' share of total permissible dividends, however, is reduced by the proportion which the new indebtedness bears to total invested capital. The difference between total permissible dividends and the shipper-owners' share of those dividends can

[13] The "Throughput Agreement" (R. 52) entered into by Arapahoe and its shipper-owners, Pure and Sinclair, is substantially the same as a direct guarantee by the shipper-owners of the loan received by the carrier. The agreement was entered into in 1954 when Arapahoe proposed to borrow $26 million from outside lending agencies for construction of a pipeline and is effective until 1974, subject to termination by any party as soon as the indebtedness is retired. Pure and Sinclair agreed either (1) to ship enough oil over the pipeline so that the tariffs paid would provide sufficient funds to meet the carriers' obligations or (2) to advance to the carrier funds necessary to meet its obligations if in any accounting period such funds were not available.

be used by the carrier to retire the indebtedness and, as the indebtedness is retired, the shipper-owner's share of seven percent of the new valuation increases until finally maximum dividends on the new base are allowed.

Thus, when the shipper-owners permit the pipelines themselves to borrow and to invest the proceeds in plant and equipment, they have in effect made the choice to forego present dividends in return for a future increase in permissible payments from the pipelines.

We wish to make clear that we do not construe any provision in the judgment as preventing the carrier from borrowing money or from retiring any indebtedness incurred. All earnings up to seven percent of total valuation may be used to retire indebtedness. Earnings in excess of that amount are placed in the special surplus account and are distributed to the stockholders of the shipper-owner upon sale or dissolution of the carrier.[14] These funds may also be used to retire any outstanding indebtedness which

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[14] Paragraph V provides that "net earnings * * * in excess of the amounts permitted to be * * * paid * * * by paragraph III * * * shall be transferred to the surplus account as a separate item" (R. 12). Funds in this account may be used for "acquiring new common carrier facilities, for maintaining normal and reasonable working capital requirements * * * and for retiring of any debt outstanding" at the time the judgment was entered. (*Ibid.*) Paragraph V concludes with the provision that "[i]n case of the dissolution, sale * * * or divorcement" of the carrier, "any retained portion of the surplus account may be disbursed to stockholders of the corporation which owns and controls the defendant common carrier at that time." (*Ibid.*)

was incurred for the purpose of "acquiring new common carrier facilities."[15]

This construction effectuates the basic purpose of the Elkins and Interstate Commerce Acts that carriers are to treat all shippers alike (see *supra*, p. 21). For by limiting all shipper-owners to the same rate of return (seven percent) on their pipeline investments, the judgment insures that particular shipper-owners will not, by virtue of the thin equity and heavy debt structure of particular pipelines, obtain what amounts to an unfair competitive advantage akin to a rebate over other shippers, including other shipper-owners, through receipt of unduly high returns on their capital investments. On the other hand, appellees' construction could lead to the anomalous situation that although some shipper-owners might obtain only a seven percent return on their investment, others could obtain far higher returns, such as the 50% or 70% that Arapahoe's parent companies could obtain. Surely that was not the result intended by the provision in the judgment that "No defendant common carrier" shall pay or credit to any shipper-owner

[15] Since paragraph V permits funds from the special surplus account to be used for "acquiring new common carrier facilities" (*ibid.*), there is no objection to the carrier using those funds to retire indebtedness incurred for the same purpose. Paragraph III(a), however, provides that valuation "shall not include the value of the common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account * * *." (R. 11) Earnings attributable to such facilities will be reflected in the annual credits to the special surplus account and will eventually be realized by the shipper-owner's stockholders.

dividends "in excess of its share of seven percentum" of such carrier's valuation—a provision intended to permit only "a fair and reasonable dividend rate * * *." See *supra*, p. 5.

The reason that the judgment used the phrase "share of seven percentum" of valuation instead of providing for a seven-percent return on investment was in order to compensate for shifts in the purchasing power of the dollar due to inflation or other market conditions. Standard accounting practice normally does not reflect the inflated value of assets[16] and, consequently, the book value of the shipper-owner's stock may not adequately reflect the present market value of its investment during, or after, periods of inflation. In other words, since the value of an "investment" changes in accordance with changes in the value of the underlying property which the investment represents, a fixed return on book value would not constitute a true measure of a fair return on investment. Valuation, on the other hand, is a rate-making concept which reflects the present value of the pipeline's common-carrier assets as determined by the Interstate Commerce Commission. A return based on valuation, therefore, will also reflect any changes in the value of the shipper-owner's investment. By limiting the shipper-owner to its "share" of seven

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[16] Generally accepted accounting procedure is to list fixed assets at original cost with appropriate modification for depreciation, depletion, and amortization. See Wixon and Kell, *Accountants' Handbook* (4th ed. 1956), § 2-33. Section 20.1 of the Uniform System of Accounts for Pipelines issued by the Interstate Commerce Commission adopts this principle. It requires that the Investment in Carrier Property Account "shall include the cost to the carrier of physical property used * * * for pipeline operations."

percent of valuation, the judgment, in effect, provides a full seven-percent return based on the shipper-owner's investment in the carrier adjusted to reflect present market value.

3. *Other provisions of the judgment support the Government's construction.*—The Government's construction of the judgment as permitting the shipper-owners a seven-percent return only on pipeline investment, and not on the total valuation of the carrier, is supported by other provisions of a judgment besides the "share of seven percentum" clause. Of course, particular provisions of a judgment "are to be read in connection with other paragraphs of the decree * * *." *Swift & Co.* v. *United States,* 276 U.S. 311, 328; *Schine Theatres* v. *United States,* 334 U.S. 110, 126.

(a) Paragraph III(a) of the judgment defines "valuation" of the carrier as "the latest final valuation of each common carrier's property owned *and* used for common-carrier purposes as made by the Interstate Commerce Commission" (R. 10, emphasis added). At the time the judgment was entered the Commission, in making valuations of pipeline properties, had already adopted the practice of treating property "owned and used" as a separate category from property "used but not owned," *i.e.,* leased, even though it included both categories in determining the carrier's over-all "final valuation" for rate-making purposes. *E.g., Atlantic Pipe Line Co.,* 47 I.C.C. Val. Rep. 541, 561 (1937); *Gulf Pipe Line Co., id.,* pp. 752, 767 (1938); *Tide-Water Pipe Co.,* 48 I.C.C. Val. Rep. 109, 115 (1938); *Great Lakes Pipe Line Co., id.,* pp.

178, 185 (1938); *Tidal Pipe Line Co., id.*, pp. 303, 308 (1939).

The fact that the judgment permits only property "owned and used" to be included in the carrier's valuation in computing permissible dividends clearly indicates that the shipper-owner cannot receive a return on property which is not attributable to its investment. For if the judgment were merely designed to limit the shipper-owner to its "share" of the carrier's total valuation as fixed by the Interstate Commerce Commission, there would be no reason for excluding from that valuation leased property which the Commission itself includes. Such property, however, does not represent any investment by the carrier (nor, therefore, by the shipper-owner). Thus if dividends were permitted to be paid on the basis of leased property, it would mean that a shipper-owner could obtain a return on property which did not reflect its investment in the carrier. The explicit provision in the judgment that only property "owned *and* used" (emphasis added) is to be treated as part of the carrier's valuation in computing permissible dividends therefore clearly indicates that such dividends are to be paid on the basis of investment, not total valuation.

(b) Paragraph V provides that earnings in excess of seven percent must be transferred to a readily identifiable special surplus account, the funds in which may be used for "extending or constructing or acquiring new common-carrier facilities * * *" (R. 12). Paragraph III provides that the value of any new facilities so acquired must be deducted from valu-

ation before computing permissible dividends (R. 10). The effect of these interlacing provisions is that, although accumulated surplus reflecting excess earnings may be utilized for expansion, the base upon which dividends are computed remains unchanged unless there is either an increase in the shipper-owner's out-of-pocket investment, or earnings within permissible dividends are retained and invested. In other words, the valuation base upon which dividends are to be determined does not increase merely because the carrier has acquired, through use of excess earnings, additional property which the Interstate Commerce Commission includes in the valuation base for rate-making purposes, but only if such additions are the result of additional direct or indirect investment by the shipper-owner.

B. APPELLEES' CONSTRUCTION OF THE JUDGMENT AS PERMITTING A DIVIDEND OF SEVEN PERCENT OF VALUATION WOULD MAKE THE DIVIDEND LIMITATION COMPLETELY INEFFECTIVE FOR ACCOMPLISHING THE PURPOSE FOR WHICH THE SUIT WAS BROUGHT

In Point A, we have shown that our construction of the judgment as limiting a shipper-owner to a seven-percent return on investment (as adjusted to reflect changes in the valuation of the underlying property of the carrier which that investment represents) would effectuate the basic purpose for which the suit was brought (and in the light of which the decree must be interpreted, see *supra*, pp. 18–19), namely, to prevent shipper-owners from gaining an unfair competitive advantage over independent oil companies which do not have pipeline interests,

through receipt of dividends which provide unduly high returns on investment. On the other hand, appellees' position that the judgment was designed only to limit the pipelines to paying or crediting dividends to their shipper-owners not in excess of seven percent of valuation, would permit continuation of the very discriminatory and preferential practices which the original suit was designed to eliminate.

Under appellees' interpretation of the dividend restriction, a shipper-owner's return on its investment could increase substantially whenever there was a significant increase in the carrier's debt. But the discriminatory effect upon a non-owner shipper of permitting a shipper-owner to receive unduly high dividend returns on its investment is not any the less because the carrier has increased its outstanding debt. For the injury to the non-owner shipper results from the fact that a part of the shipper-owner's transportation costs may be returned to it indirectly in the form of dividends, and thus the shipper-owner obtains transportation at a lower ultimate cost than the non-owner. Whether such a discriminatory rebate occurs depends upon whether the shipper-owner receives an unduly high return on investment, not upon whether the carrier increases its valuation by incurring debt.

The basic vice of appellees' construction is that it would permit the shipper-owners to receive dividends which reflect neither any investment by them in the carrier, nor any fair measure of any additional financial

risk which they may have assumed in connection with the creation of the carrier's debt. Under the Government's construction, the decree gives the shipper-owners not only a seven-percent return on their original investment, but additional dividends reflecting the increase in their "share" of valuation which occurs as the outstanding debt is retired through payments to the sinking fund (see *supra,* pp. 24–25). These additional dividends must be deemed to constitute adequate compensation for any increased risk which the shipper-owner incurs when the debt is created. Since the further additional permissible dividends which would result from allowing a seven-percent return on total valuation thus would not be attributable to any contribution made by the shipper-owner, but only to capital furnished by third parties, they must be viewed as a partial return of amounts paid for transportation—the very evil which the judgment was designed to prevent.

In the instant case, the effect of appellees' construction of the judgment is to permit Arapahoe, only three years after its organization, to pay dividends to its shipper-owners of approximately 70 percent on investment (see *supra,* p. 7). In terms of preventing rebates, a dividend limitation which permits such a return is a practical nullity.

If the permissible dollar dividends of the shipper-owner can be immediately increased by making the equity thinner, the seven-percent limitation in the decree serves substantially no purpose in accomplish-

ing the over-all objective for which the suit was filed, namely, to preclude the payment of dividends by the pipeline to the shipper-owner in such substantial amounts as to constitute rebates and discriminatory preferences forbidden by the Elkins Act and the Interstate Commerce Act. While it is true that the judgment was entered on consent, it cannot be assumed that the Government would have agreed to a settlement of the case upon terms which, as a practical matter, would have no significant effect upon the discriminatory practices which the suit was intended to eradicate.

In choosing between the conflicting constructions of the dividend limitation, the practical effects of each construction are highly significant. The Government's interpretation would limit the shipper-owners to a reasonable return upon their pipeline investments and would thereby avoid any possibility of the discriminatory rebates which the suit was intended to prevent. Appellees' construction would permit the shipper-owners to receive such high dividend returns on their investment as to enable them to obtain a significant competitive advantage in transportation costs over oil companies which have no pipeline investments. Viewed in this light, the public interest clearly requires that the phrase "share of seven percentum" of valuation be construed to limit the shipper-owners to a seven-percent return on investment.

C. THE GOVERNMENT'S ALLEGED ACQUIESCENCE IN APPELLEES' INTERPRETATION OF THE JUDGMENT SHOULD NOT BAR IT FROM OBTAINING THE RELIEF HERE SOUGHT

The district court, although ruling that the decree is "clear upon its face" (R. 178), further held (*ibid.*) that any ambiguity "had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years [since the decree was entered]." This alleged acquiescence is based on the fact that during the period 1942 to 1957 a number of the pipeline companies filed reports with the Attorney General, as required by the judgment,[17] which indicated that they had calculated permissible dividends to their shipper-owners on the basis of a seven-percent return on the carriers' total valuation; that the Attorney General did not question the correctness of the permissible dividends, but allegedly implicitly approved their basis in certain communications sent to appellees with respect to those reports; and that in 1942 the Department of Justice took a position in connection with a proposed recapitalization plan of one of the pipeline defendants which is inconsistent with the position now taken. In addition, appellee Arapahoe relies on a letter written in February 1944 by the then Attorney General to Senator Gillette stating, *inter alia,* that "the defendant oil company may receive profits from its own pipelines to the extent of 7% of

[17] Paragraph VIII of the judgment (R. 13) requires each defendant pipeline to file an annual report with the Attorney General showing, for the previous year, the valuation used as an earnings base, permissible dividends under the decree, dividends actually paid out, and the amounts transferred to or withdrawn from the special surplus account.

valuation" (Motion to Affirm, p. 17; see R. 48). In sum, appellees contend (Arapahoe Motion to Affirm, p. 16; see Interstate and Tuscarora Motion to Dismiss or Affirm, pp. 17-18) that during the sixteen-year period from the entry of the judgment to 1957, the Department "agreed with the industry interpretation."

At the outset, we recognize that there were filed with the Attorney General a number of reports which on their face indicated that appellees were calculating permissible dividends on the basis of a seven-percent return on the carriers' total valuation. However, we do not believe that this fact, or the further fact that the Department of Justice raised no objections to those reports, should operate to bar it from now obtaining prospective relief against what we believe to be a serious misapplication of the judgment provisions. As we shall show, the failure of the Department to act with respect to this matter for sixteen years was not because it agreed with the defendants' construction of the judgment. Rather, it was due in part to changing views within the Department as to the best method of handling the complex enforcement questions which the judgment presented, and in part to preoccupation with other enforcement problems under the decree.

The enforcement activities of the Department of Justice with respect to the decree were fully described in the recent hearings (October 1957) before the House Antitrust Subcommittee. See Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of

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the House Committee on the Judiciary, Part I, 85th Cong., 1st Sess. (hereinafter referred to as "Hearings"), *passim*. During the period 1942 to 1957, the Department repeatedly had under study various questions with respect to the defendants' compliance with the different provisions of the judgment. See, *e.g.*, *id.*, pp. 205, 211, 217, 246, 249. During that period, three investigations of possible violations of the judgment were conducted by the Federal Bureau of Investigation (two of them before 1953, *id.*, p. 376), "[n]umerous" letters of inquiry were sent to the defendants, and there were 31 "official interpretations" of various provisions of the judgment by the Department. *Id.*, p. 77.

Assistant Attorney General Hansen explained to the subcommittee that the Government delayed instituting enforcement proceedings until 1957 because originally it was of the view that the most effective method for dealing with the various violations which had come to its attention would be "one overall proceeding raising the myriad issues the decree might post [pose]" (*id.*, p. 28; see, also, pp. 218, 377). However, after further study it was decided that the "most effective enforcement" of the decree would "stem * * * from a series of separate enforcement actions designed to implement the decree's key provisions" (*ibid.*). The Government thereafter filed "four proceedings * * * to effectuate the decree" (*ibid.*).

While on its face the decree appears relatively simple, its proper interpretation has presented a

large number of extremely difficult and complex legal and financial questions.[18] See *supra*, p. 36. The Department's early compliance endeavors were concerned primarily with issues other than the proper construction of the "share of seven percentum" clause. See Hearings, *passim*.[19] While hindsight may now suggest that the Government should have sought judicial relief at an earlier date, its delay in doing so cannot be construed as acquiesence in appellees' construction of the judgment.

Since, as we show *infra*, pp. 41–43, the Government's prior failure to act cannot bar it from obtaining relief to which it is now entitled, the alleged acquiescence is significant only insofar as it supports appellees' construction of the judgment. We believe that Government acquiescence in a construction of a judgment designed to prevent rebates, where such construction could result in returns on investment of 70 percent or more, should not be implied unless there has been a clear and unequivocal affirmative statement by the Department that, after full consideration of the terms

[18] In material submitted to the House Antitrust Subcommittee, appellee Service described the decree as "indefinite, uncertain, ambiguous, and susceptible of * * * many interpretations * * *." Hearings, p. 1211.

[19] The questions raised by the Department in letters to various appellees dealt primarily with such issues as which valuation of the Interstate Commerce Commission was the "latest final valuation" under the decree (R. 122, 163); the proper methods for bringing valuation down to date (R. 115, 122–123); the treatment of debts owed by the pipelines to their shipper-owners (R. 129–130, 134, 156); and whether surplus earnings were used to retire debt (R. 119).

of the decree, it had concluded that the shipper-owner's "share" of earnings was to be measured by return on valuation rather than return on investment.[20] No such statement was ever made.

A number of the communications between appellees and the Department of Justice with respect to this issue are set forth in the record (*E.g.*, R. 115–125, 161–165). We do not believe that they support Arapahoe's statement (Motion to Affirm, p. 16) that the Attorney General "repeatedly and affirmatively showed his concurrence in the interpretation placed on the consent judgment by the defendants." On the contrary, they show only that the Attorney General accepted without challenge reports showing permissible dividends of seven percent of valuation.[21]

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[20] Appellee Service has stated (Hearings, p. 327), in connection with the interpretation of another provision of the decree, that "[i]t has never been our position that such [express] interpretations by the Attorney General would necessarily * * * [be] * * * correct, since we have recognized the fact that any such interpretation, in order to be entirely reliable, must be made by a court."

[21] Indeed, one of the letters by the Attorney General upon which Arapahoe relies (Motion to Affirm, p. 17) to show alleged approval, dealt only with the question of what constituted the "latest final valuation" of a carrier's property under the judgment (R. 122–123). While the carrier's letter, after setting forth its construction of the "latest final valuation" clause, indicated its view that dividends "not in excess of 7% of the valuation * * * determined in accordance with the foregoing principles would be proper under the Consent Decree" (R. 121), the Department's reply stated that in "giving you our views on the points raised by your letter of June 11, 1951 [the questions with respect to valuation which were the only ones discussed in the reply], it is, of course, understood that we are not expressing ourselves on any collateral issue" (R. 122).

For the reasons previously stated, we do not believe that the Government's failure to question the correctness of those reported permissible dividends fairly can be equated with affirmative approval thereof.

In *United States* v. *San Francisco,* 310 U.S. 16, Congress in 1913 had granted to San Francisco certain public lands to be used, *inter alia,* for generation, sale, and distribution of electric power. The Act, however, prohibited the sale of power produced thereon to any private person. More than 20 years later the Secretary of the Interior determined that the City was violating the prohibition by selling the power through a private utility company, and the United States brought suit to enjoin such sale. One of the City's defenses was that "the Department of the Interior in the period from 1913 to 1937 construed" the prohibition "to forbid no more than sale of power for resale"; it also "suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government" (310 U.S. 16 at 31). This Court, in rejecting the contention, stated (*ibid.*) that it was "doubtful" whether the Interior Department "at any time ever did more than merely to tolerate sale and distribution" of the power by the private company "as a temporary expedient"; and it ruled (*id.*, pp. 31–32) that it could not "accept the contention that administrative rulings * * * can thwart the plain purpose of a valid law."

In the instant case, the record similarly shows only that the Department of Justice "[n]ever did more than merely to tolerate" appellees' construction of

the judgment. There was no affirmative agreement with that interpretation. By the same reasoning as in the *San Francisco* case, therefore, these "administrative rulings * * * can[not] thwart" the basic purpose of the judgment.

Nor do we believe that the Government's consent in 1942 to an order approving, as "not in violation of the terms of" the consent decree, a plan for recapitalization of appellee Great Lakes Pipe Line Company ("Great Lakes") (R. 143), can fairly be said to show its acquiescence in the industry's construction. The Great Lakes recapitalization plan provided that the carrier would borrow $12,000,000 which would be used to pay a capital dividend, thereby reducing its shipper-owners' investment from $13,-722,300 to $2,470,014 (R. 136-137). Great Lakes agreed to make certain reductions in its permissible dividends under the judgment (R. 137-140). Its petition (R. 140) requested entry of an order "declaring that the plan * * * is not in violation of the terms of" the consent judgment. It further stated (R. 139-140, emphasis added; see R. 141), however, that "the relief requested herein does not affect any of the numerous defendants except your petitioner [Great Lakes] and [the defendant shipper-owners of Great Lakes], in their capacity as shipper-owners of your petitioner but *only in respect of the specific plan set forth herein* * * *." Similarly, the consent order approving the plan recited that it was "without prejudice to the rights of any of the parties to this cause *in any matter other than the specific plan set forth herein*" (R. 143, emphasis added).

Thus, even assuming, as Arapahoe argues (Motion to Affirm, p. 18), but without conceding, that the provisions of the Great Lakes plan are "wholly inconsistent" with the Government's present position, we submit that such consent at most showed that the Government did not object to the "specific plan" there involved. Such consent could not constitute acquiescence in any general construction of the judgment. *A fortiori*, it does not support the contention, made in the district court by Arapahoe, that since its shipper-owners also were shipper-owners of Great Lakes and therefore were parties to the *Great Lakes* proceeding, the order there entered is *res judicata* with respect to the "share of seven percentum" issue.[22]

2. If, as we believe, appellees are not now properly applying the judgment, we submit that even if it be assumed that the Government should have acted sooner to correct such misapplications, the lapse of time is immaterial. This is not a private suit for damages or one to adjust private rights, but a proceeding brought by the Government to protect the public interest. "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in a proper enforcement of this judgment "are not to be forfeited as a result." *United States* v. *California*,

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[22] A similar *res judicata* contention was made by appellees Sinclair Pipe Line Company (R. 154), Texas Pipe Line Company (R. 167–168), Texaco-Cities Service Pipe Line Company (R. 170), and Texas-New Mexico Pipe Line Company (R. 172), who were also shipper-owners of Great Lakes and therefore parties to the 1942 recapitalization proceedings.

332 U.S. 19, 39–40. Similarly, it is immaterial whether the record shows acts which "are undoubtedly consistent with a belief on the part of some Government agents at the time" that appellees were correctly interpreting the judgment. (*Id.*, p. 39.) For principles such as "acquiescence, laches, or failure to act," which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights (*Id.*, pp. 39–40).

This case appears to be a particularly appropriate one for application of this principle. For the consent judgment is designed to serve the public purpose of protecting non-owner shippers from the competitive injury which might result if shipper-owners, under the guise of dividends, could receive what in effect would amount to rebates of part of their transportation charges. The judgment affects an important segment of the economy. And, as we pointed out in our jurisdictional statement (p. 22), the Government is not seeking to apply its construction of the judgment retroactively, but is concerned solely with its prospective operation.

Although several of the pipelines have stated (R. 50, 113, 127, 150, 169) that, in reliance on the Government's alleged acquiescence in their construction of the judgment, they incurred substantial indebtedness, they have not shown that prospective application of the Government's construction would either prejudice them or result in unfair treatment. For as we have pointed out in Point A (*supra*, pp. 24–26), our interpretation does not prevent the carriers from borrow-

ing money or from paying to their shipper-owners a reasonable return reflecting that money. While the creation of debt initially may cause a marked decrease in the permissible dividends payable by companies with extremely high ratios of debt to capital, the shipper-owners of those companies will be adequately compensated by future increases in the amounts of permissible dividends which result when the carriers' indebtedness is retired. In the circumstances, the Government's possible acquiescence or delay should not operate to bar it from obtaining relief against future misapplications of the "share of seven percentum" dividend limitation.

CONCLUSION

The order of the district court of March 25, 1958 denying the plaintiff's motion for an order carrying out the judgment against Arapahoe and granting other relief should be reversed.

Respectfully submitted,

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MARCH 1959.

APPENDIX

Section 6(7) of the Interstate Commerce Act, 49 U.S.C. 6(7), provides as follows:

> § 6(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sections 1 and 3 of the Elkins Act, 49 U.S.C. 41, *et seq.*, provides in pertinent part as follows:

> Section 1:
>
> § 41(1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor committed by such corporation, and upon conviction

thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: * * * [49 U.S.C. 41(1)]

*   *   *   *   *

§ 41(3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall

knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be. [49 U.S.C. 41(3)]

* * * * *

Section 3:

43. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be pre-

sented alleging such facts to the district court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the

carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided,* That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission. [49 U.S.C. 43]

*   *   *   *   *

U. S. GOVERNMENT PRINTING OFFICE: 1959

No. [illegible]

In the Supreme Court of the United States

[illegible]

[illegible]

[illegible] COMPANY, ET AL.

[illegible]

[illegible] [illegible],
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATLANTIC REFINING COMPANY, ET AL.

MOTION TO REMAND

The Solicitor General, with the concurrence of appellees Tidal Pipe Line Company and Tidewater Oil Company and appellees Service Pipe Line Company and Standard Oil Company (Indiana), moves that the proceedings on the appeal from the orders of the District Court denying the motions of the Department of Justice "for order carrying out" the final judgment in *United States of America* v. *The Atlantic Refining Company, et al.*, with respect to those appellees be remanded for further proceedings in the District Court. The purpose of this motion is to enable the parties, in accordance with the attached stipulations, to apply jointly to the District Court for (1) withdrawal of the motions as to those appellees filed in the District Court by the Department of Justice; and (2) vacation of the orders by the District Court entered thereon.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1959.

500271—59

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES

v.

THE ATLANTIC REFINING COMPANY, ET AL.

STIPULATION

In its Jurisdictional Statement, filed July 23, 1958, the United States stated that it "is not seeking to give its construction of the judgment any retroactive effect. We are concerned only with its prospective operation * * *." Accordingly, it is stipulated between counsel for the appellant United States and counsel for appellees Tidal Pipe Line Company and Tidewater Oil Company that

(1) The Solicitor General, with the concurrence of said appellees, will move in the Supreme Court to remand to the District Court the proceedings on appeal from the order of the District Court denying the Motion of the Department of Justice "for order carrying out" the final judgment in the above-captioned cause as to Tidal and Tidewater;

(2) Upon such remand the parties to this stipulation will apply jointly to the District Court for

(*a*) withdrawal of said Motion by the Department of Justice;

(*b*) vacation of the order by the District Court entered thereon.

(3) Hereafter in determining the valuation of its property under ¶ III of the consent judgment entered December 23, 1941, in *United States* v. *The Atlantic Refining Company, et al.* (Civil Action No. 14060, U.S. District Court for the District of Columbia), appellee Tidal Pipe Line Company will not include any property which it uses but does not own.

(4) In the event of any dispute that may arise in the prospective application of the consent judgment of December 23, 1941, this stipulation shall be binding upon the parties hereto as to the matters comprehended therein.

/s/ J. Lee Rankin,
J. LEE RANKIN,
Solicitor General,
For the appellant United States of America.

/s/ JOSEPH P. TUMULTY, JR.,
For appellees Tidal Pipe Line Company and Tidewater Oil Company.

MARCH 10, 1959.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES

v.

THE ATLANTIC REFINING COMPANY, ET AL.

STIPULATION

In its Jurisdictional Statement, filed July 23, 1958, the United States stated that it "is not seeking to give its construction of the judgment any retroactive effect. We are concerned only with its prospective operation * * *." Accordingly, it is stipulated between counsel for the appellant United States and counsel for appellees Service Pipe Line Company and Standard Oil Company (Indiana) that

(1) The Solicitor General, with the concurrence of said appellees, will move in the Supreme Court to remand to the District Court the proceedings on appeal from the order of the District Court denying the Motion of the Department of Justice "for order carrying out" the final judgment in the above-captioned cause as to Service and Standard;

(2) Upon such remand the parties to this stipulation will apply jointly to the District Court for

(*a*) withdrawal of said Motion by the Department of Justice;

(*b*) vacation or the order by the District Court entered thereon.

(3) Commencing with the annual report to the Attorney General to be filed in April 1960 pursuant to paragraph VIII of the consent judgment in *United States* v. *The Atlantic Refining Company, et al.* (Civil Action No. 14060, U.S. District Court for the District of Columbia), appellee Service, in making any annual adjustments in the latest final valuation of its property owned and used for common-carrier purposes made by the Interstate Commerce Commission to reflect additions and betterments to, and depreciation on and retirements of, such property, under paragraph III(a) of the decree, shall not include the pro-rata share of any additions, betterments, or retirements completed, or depreciation occurring, after the close of the next preceding year.

(4) In the event of any dispute that may arise in the prospective application of the consent judgment of December 23, 1941, this stipulation shall be binding upon the parties hereto as to the matters comprehended therein.

/s/ J. Lee Rankin,
J. LEE RANKIN,
Solicitor General,
For appellant United States of America.

/s/ Hammond E. Chaffetz,
HAMMOND E. CHAFFETZ,
For appellees Service Pipe Line Company and Standard Oil Company (Indiana).

MARCH 12, 1959.

No. 210

In the Supreme Court of the United States

October Term, 1958

United States of America, Appellant

v.

The Atlantic Refining Company, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,

VICTOR R. HANSEN,
Assistant Attorney General,

DANIEL M. FRIEDMAN,
W. LOUISE FLORENCOURT,
Attorneys,

Department of Justice, Washington 25, D. C.

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UNITED STATES OF AMERICA, APPELLANT

v.

THE ATLANTIC REFINING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

OPINION BELOW

No opinion was rendered by the United States District Court for the District of Columbia. The oral statements made by the court in denying the Government's motions are set forth in Appendix A, *infra*, pp. 27–30.

JURISDICTION

This suit was brought under 49 U. S. C. 43 to enjoin appellee common carriers from granting, and appellee shipper-owners from receiving, respectively, refunds, rebates and offsets against regular tariff charges for the interstate transportation of property by pipeline, in violation of the Interstate Commerce Act

and the Elkins Act. The orders of the district court denying the Government's motions for enforcement of the judgment were entered on March 24 and March 25, 1958, and the notice of appeal was filed in that court on May 24, 1958.

The jurisdiction of this Court to review the orders on direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, 49 U. S. C. 45, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, and is sustained by *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, and *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U. S. C. 1, *et seq.*, and the Elkins Act, 49 U. S. C. 41, *et seq.*, are set forth in Appendix B, *infra*, pp. 31–35.

QUESTIONS PRESENTED

The Government's complaint in a suit under the Interstate Commerce Act and the Elkins Act charged that common carrier pipeline companies had departed from published tariffs and had given illegal rebates through the payment of dividends to their oil company owners, which also were their principal shippers. A consent judgment entered in the case prohibits the carriers from paying any dividends to a shipper-owner "which in the aggregate [are] in excess of its share of seven per centum (7%) of the valuation of such common carrier's property * * *." The

judgment further provides that "Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission"; and that such valuation is to be adjusted by adding thereto the value of "additions and betterments," and subtracting therefrom the value of "depreciation on, and retirements," computed by the carrier "as of the close of the next preceding year * * *."

The following questions with respect to the construction of the judgment are presented by this appeal:

1. Whether a shipper-owner's "share" of 7% of the common carrier's property valuation is limited to that proportion of 7% of such valuation which represents the ratio of the shipper-owner's investment in the carrier to the carrier's total invested capital, including long-term debt.

2. Whether a common carrier, in determining the valuation of its property "owned *and* used" for common carrier purposes, may include property which it uses but does not own.

3. Whether a carrier, in making adjustments "as of the close of the next preceding year" to reflect increases and decreases in its final valuation, may include increases and decreases which occurred after the close of such year.

STATEMENT

On December 23, 1941 the United States filed a civil action under Section 3 of the Elkins Act (49

U. S. C. 43) against 20 major oil companies, 7 affiliated oil companies, and 52 common carrier pipeline subsidiaries of the oil companies, charging violations of the Elkins and the Interstate Commerce Acts. The complaint alleged (Pars. 6 and 7) that the defendant shipper-owners (the oil companies) were paying the applicable tariff rates filed with the Interstate Commerce Commission by the pipelines for transportation of petroleum products, but were receiving refunds, rebates and offsets against regular tariff charges which were "passed on or credited, directly or indirectly, by the defendant common carriers to their defendant shipper-owners under the guise of dividends and earnings * * *." The complaint sought injunctive relief and treble damages.

On the same day, a consent judgment was entered. The judgment[1] prohibits any of the pipeline defendants from crediting or paying in any calendar year (commencing January 1942) to any shipper-owner any earnings, dividends, sums of money or other valuable considerations "which in the aggregate is in excess of its share of 7 per centum (7%) of the valuation of such common carrier's property * * *." The judgment further provides that "[v]aluation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission"; and that such valuation is

[1] The judgment recites that it was entered "without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue and in final settlement of all claims herein in issue."

to be adjusted annually by adding thereto the value of "additions and betterments" to, and subtracting therefrom the value of "depreciation on, and retirements" of, common carrier property, "computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date * * *."

On October 11, 1957, the Government instituted four proceedings against different defendants for construction of various provisions of the judgment. Three proceedings were in the form of motions for carrying out the judgment; the fourth was a petition for civil contempt. The latter was settled on February 12, 1958, through entry of a consent order directing the company involved (The Texas Pipe Line Company) to apply the judgment in accordance with the Government's construction.[2]

After hearing, the district court denied the three motions.

THE ARAPAHOE MOTION

Arapahoe Pipe Line Company ("Arapahoe") was organized in 1954 by the Sinclair Pipe Line Company ("Sinclair") and The Pure Oil Company ("Pure"). Arapahoe is a common carrier under the judgment and Sinclair and Pure are both shipper-owners. Pure and Sinclair each invested $1,450,000 in Arapahoe's capital stock. Thereafter, Arapahoe issued $26,-

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[2] The contempt petition which resulted in the consent order raised the same issue as the Tidal motion, which the court decided against the Government. See *infra*, pp. 7–8.

000,000 in 25 year bonds to an insurance company. On October 11, 1957, the date on which the Government's motion was filed, Arapahoe's capital thus totalled $28,900,000, consisting of $2,900,000 in capital stock and $26,000,000 in funded debt.

The motion alleged that because Arapahoe had "failed to deduct from the valuation of its common carrier property, before computing its shipper-owners' permissible dividend, the share of the valuation of the company's carrier property financed by or attributable to the aforesaid loans of $26,000,000 from third parties," it "has computed dividends for its shipper-owners in excess of its shipper-owners' share of 7% of the valuation of Arapahoe's property in violation of the judgment." The motion stated that reports which Arapahoe had filed with the Attorney General (as required by the judgment) reported "allowable dividends" of $1,526,495 and $2,109,569 available for distribution to stockholders for the calendar years 1955 and 1956, respectively; and that such dividends would constitute returns for those years of 52.6% and 72.7%, respectively, on the shipper-owners' total investment of $2,900,000.

The relief sought was that Arapahoe be directed, "before computing the permissible dividends for its shipper-owners, to deduct from the valuation of its property owned and used for common carrier purposes the share of such valuation that is the result of or attributable to monies obtained by the carrier from third parties for extending existing or constructing or acquiring new common carrier facilities * * *,"

and "for such other and further orders as may seem appropriate and necessary to the Court."

In denying the motion, the district court held that "this decree is clear upon its face," and that it therefore had "no right to rewrite the agreement reached between the respective parties after due deliberation and approval by the Court in 1941 and again in 1942 by the supplemental order."[3] The court further ruled that "even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years [since entry of the decree]."

THE TIDAL MOTION

The decree defines valuation as the "final valuation of each common carrier's property owned *and* used for common carrier purposes as made by the Interstate Commerce Commission." (Emphasis added.) The Government's motion alleged that Tidal Pipe Line Company ("Tidal") had violated the foregoing provision by "computing the permissible 7% dividend to its shipper-owner on the basis of all property used by it for common carrier purposes, whether owned by it or not * * *." In its answer, Tidal admitted that it included property "used but not owned" in

[3] In 1942 a supplemental order, entered on consent, authorized Great Lakes Pipe Line Company (one of the common carriers that was a party to the judgment) to refinance its outstanding debt. Great Lakes was one of the four defendant pipeline companies which had outstanding debt when the judgment was entered.

calculating the 7% dividend. (The property involved was leased by Tidal.) Its defense was that "the valuations to be used [under the judgment] in computing permissible dividends to shipper-owners are those used by the Interstate Commerce Commission for rate purposes, and that same include property used but not owned * * *."

In denying the motion, the district court ruled that the "decree must be read as a whole"; and that since there was no "indication of an intent of the parties to the consent decree to utilize but one I. C. C. classification as the basic value," the reference in the decree to the Commission's "final valuation" of the carrier's property meant the valuation for rate making purposes (which included property used but not owned). The court further ruled that "if there be any ambiguity, the practice through the years has shown an acquiescence on the part of the Government in the interpretation placed on the decree by Tidal."

THE SERVICE MOTION

When the consent judgment was entered, the Interstate Commerce Commission was not making annual valuations of pipeline carriers. Therefore, the judgment provided that each defendant carrier should compute its own final valuation by bringing the latest Commission final valuation up to date. Paragraph III (a) specified that the carrier was to do this by adding the value of "additions and betterments" and deducting "depreciation on, and retirements" computed by the carrier *"as of the close of the next preceding year."* (Emphasis added.)

Beginning in 1950, the Commission began to publish annual final valuations of the defendant common carriers made as of December 31 of each calendar year (beginning with the year 1947). However, defendant Service Pipe Line Company ("Service") did not adjust these annual valuations to reflect "additions and betterments" and "depreciation on, and retirements" as of the close of the next preceding year, but gave effect to adjustments made in the following year. For example, additions or retirements made in March would be treated as if they had occurred on the preceding December 31. The Government's motion sought to require Service "to compute its shipper-owner's permissible dividend each year on the basis of the valuation [of its property] as of the preceding year * * *."

In denying the motion the district court, "[l]ooking at the language and purpose of the decree as a whole, and considering the equities or inequities which would result by too literal an interpretation of the decree," concluded that it was doing no "violence to the decree as a whole when [it] construe[d] it to permit" what Service had done. The court added: "Particularly, in view of the lapse of time and the complete and full disclosure of this interpretation over the period of time, which has operated both for and against the company as the facts dictated and has been in conformity with Interstate Commerce Accounting practices, I do not feel I would be warranted in upsetting on a literal construction of a few words, although they may, in my judgment put some doubt on the construction followed by Service and Standard."

ARGUMENT

I

THIS COURT HAS JURISDICTION TO HEAR THE APPEAL

Because of initial uncertainty as to which court has jurisdiction, the Government filed notices of appeal both to this Court and to the court of appeals. A fuller analysis of the applicable statutory provisions, their legislative history, and the pertinent decisions has led to the conclusion that it is this Court, and not the court of appeals, which has jurisdiction.[4]

The complaint in the instant case was filed under Section 3 of the Elkins Act (49 U. S. C. 43) to enjoin violations both of Section 1 of that Act (49 U. S. C. 41), which prohibits the granting or receipt of rebates, and of Section 6 (7) of the Interstate Commerce Act (49 U. S. C. 6 (7)), which prohibits carriers from departing from published tariffs.[5] The judgment, however, only enjoins the payment or receipt of dividends in excess of certain amounts—a provision which obviously is designed to deal with the Elkins Act, rather than the Interstate Commerce Act, violations charged in the complaint. The appeal is from orders construing those judgment provisions.

Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, provides as follows:

> In every civil action brought in any district court of the United States under any of said

[4] If this Court notes probable jurisdiction, the Government will not proceed further with its appeal to the court of appeals.

[5] The complaint also sought treble damages.

> Acts wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

The reference to "said acts" relates back to Section 1 of the Act, which defines the acts to which it is applicable as:

> The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 [the Sherman Act], "An Act to regulate commerce," approved February 4, 1887 [the Interstate Commerce Act], or any other Acts having a like purpose that may hereafter be enacted.

The foregoing enumeration of Acts to which the Expediting Act is applicable has been codified in 15 U. S. C. 28 to read * * * "sections 1-7 of this Title, Chapters 1, 8 and 12 of Title 49, or any other Acts having a like purpose that hereafter may be enacted * * *."[6]

The Expediting Act thus provides for direct appeal to this Court from a final district court judgment in any civil action brought by the United States under the Interstate Commerce Act or under "any other

[6] Sections 1 to 7 of Title 15 are Sherman Act provisions; chapters 1, 8, 12 and 13 of Title 49 are parts I to IV, inclusive, of the Interstate Commerce Act. The Elkins Act is chapter 2 of Title 49.

Section 2 of the Expediting Act also has been codified as 49 U. S. C. 45. That provision reads as follows: "In every civil action brought in any district court of the United States under sections 1-7 and 15 of Title 15, chapters 1, 8, 12, and 13 of this title, or any other Acts having a like purpose that may be hereafter enacted, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Acts having a like purpose that hereafter may be enacted." We submit that the Elkins Act is an Act "having a like purpose" to that of the Interstate Commerce Act, and that the Expediting Act therefore is applicable to civil suits brought by the United States under the Elkins Act.

The purpose of the Elkins Act, which was enacted on February 29, 1903 (32 Stat. 847), 18 days after the enactment of the Expediting Act (32 Stat. 823), was "to increase the efficiency of the present interstate-commerce law" (H. R. Rep. No. 3765, 57th Cong., 2d Sess., p. 1). The House Committee reported that "the legislation proposed by the Elkins bill, together with the present interstate commerce law, covers about all the ways that thought or language can devise or describe to prevent the granting of discriminations in favor of one shipper as against another * * *" (*id.*, p. 6). The Act also extended the criminal provisions of the Interstate Commerce Act—an extension which "practically exhaust[ed] the power of legislation to prevent rebates and discriminations through criminal proceedings." *Id.*, p. 6. This Court has recognized that "[t]he Elkins Act is a part of the federal statutory system for the regulation of interstate carriers of commerce. As with other portions of that system a chief purpose for its enactment was to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activities on an equal basis." *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 461; see *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 309.

Further indication that Congress intended this Court to have jurisdiction to review on direct appeal final judgments entered in proceedings brought under the Elkins Act by the United States is the proviso in Section 3 of that Act (49 U. S. C. 43) making the Expediting Act applicable to "any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission." Section 3 of the Elkins Act authorizes the Attorney General, either on his own motion or upon request of the Interstate Commerce Commission, to direct the United States attorneys to institute and prosecute proceedings for violation of the Elkins Act or of certain provisions of the Interstate Commerce Act designed to prohibit discrimination. The Section 3 proviso was designed to give "suits commenced in the name of the Interstate Commerce Commission the benefit of early hearing and disposition in the same manner as is provided for suits commenced in the name of the United States by the [Expediting Act]." H. Rep. 3765, 57th Cong., 2d Sess., p. 7. In other words, Congress provided for expedited hearing and appeal of all cases brought by the Government to enjoin rebating and related discriminatory practices, no matter in whose name the suit was instituted.

Thus, if the instant action had been filed by the Attorney General at the request and in the name of the Commission, Section 3 of the Elkins Act explicitly would have given this Court direct appellate jurisdiction. We submit that the result should be no different because the suit was brought by the United States on its own motion and in its own name. It would

indeed be anomalous if appeal from the final judgment in the identical action would be to this Court if it were brought by the Attorney General in the name of the Commission and to the court of appeals if it were brought by him in the name of the United States.

In *Union Pacific R.* v. *United States*, 313 U. S. 450, the United States, at the request of the Commission, filed a bill in the district court to enjoin a railroad and various other persons from violating the Interstate Commerce Act and the Elkins Act through the giving of discriminatory concessions to shippers. The defendants appealed directly to this Court from the final judgment of the district court granting a permanent injunction against the violations found. Since the case was brought in the name of the United States, it was not covered by the proviso of Section 3 of the Elkins Act, since that only applies to cases "prosecuted * * * in the name of the Interstate Commerce Commission." This Court, treating the substantive issues as involving only violations of the Elkins Act (pp. 461–474), nevertheless held (p. 454) that "[t]he appeal comes direct to this Court by virtue of the Expediting Act, 49 U. S. C. § 45, under § 238 (1) of the Judicial Code." See, also, *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1, cited in *Union Pacific*.

We submit that the *Union Pacific* case fully supports the jurisdiction of this Court to hear this appeal. The bill there, as the complaint here, charged violations both of the Elkins Act and of the Interstate

Commerce Act. In both cases, the conduct enjoined constituted primarily violations of the Elkins Act rather than of the Interstate Commerce Act. The fact that there the Attorney General instituted the action at the request of the Commission, whereas in the instant case he instituted it on his own motion, does not justify any distinction between the cases.[7]

II

THE QUESTIONS ARE SUBSTANTIAL

A. This appeal presents the substantial question of the meaning of a key provision of a consent judgment which affects an important segment of the American economy—the transportation of oil by pipeline. The complaint in the case charged that any payment of dividends by pipeline companies to their oil company owners constituted illegal rebates which violated the Elkins and the Interstate Commerce Acts, and the case was settled by a consent decree which limits the amount of such dividends to a 7% return. The district court's interpretation of the judgment would permit shipper-owners to receive annual returns of

[7] The only case we have found in which a court of appeals reviewed a judgment in an Elkins Act civil case brought by the United States is *United States* v. *General Motors Corporation*, 226 F. 2d 745 (C. A. 3). The jurisdictional question was not there raised, and the court apparently assumed that it had jurisdiction. Furthermore, the case was a suit in which the United States sought only treble damages from a shipper for receipt of prohibited rebates. Different considerations may be applicable to such cases than are applicable to suits to enjoin violations. Cf. *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 440–443.

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50% or 70% or, indeed, much higher amounts, on their pipeline investments. We submit that such a construction violates the basic plan of the judgment—to limit shipper-owners to a reasonable return on their pipeline *investments*—and would permit continuation of the discriminatory and preferential practices which the original suit was designed to correct.

1. The judgment prohibits any pipeline defendant from paying or crediting annual dividends to its shipper-owner "which in the aggregate is in excess of its share of 7 per centum (7%) of the value of such common carrier's property * * *." We submit that under this provision a shipper-owner's "share" of 7% of the valuation of the pipeline's property is the proportion which its investment in the carrier bears to the latter's total invested capital and not, as appellees contend and the district court held, its proportionate share of total outstanding capital stock.

A simple illustration will make clear the respective positions of the Government and of appellees. Assume that two shipper-owners have invested $1,000,000 each in the capital stock of a pipeline, that the pipeline has issued $18,000,000 in long-term funded debt, and that the present valuation of the pipeline made by the Interstate Commerce Commission is $40,000,000. Under the Government's construction of the judgment, the "share" of each shipper-owner would be calculated as follows: the permissible dividends would be 7% of the total valuation of $40,000,000, or $2,800,000. However, each shipper-owner's "share" of that amount would be the relationship

of its total investment of $1,000,000 to the total invested capital of $20,000,000, or one to twenty. The maximum dividends which each carrier would receive, therefore, would be 5% of $2,800,000, or $140,000. However, under appellees' construction, which the district court adopted, each carrier could receive one-half of 7% of the total valuation of $40,000,000, or an annual dividend of $1,400,000 on its investment of $1,000,000—a return of 140%.

We submit that the judgment was not intended to permit such an anomalous result. Although the district court ruled that the phrase "share of 7 per centum (7%) of the valuation" of the carrier's property is "clear on its face," we believe that "share" may refer either to shares as between stockholders (as appellees contend), or as between stockholders on the one hand and creditors on the other.[8] The meaning of a decree "is * * * to be determined * * * upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish." *Mayor and Aldermen of Vicksburg* v. *Henson*, 231 U. S. 259, 273. See, also, *Union Pacific R. Co.* v. *Mason City & Ft. D. R. Co.*, 222 U. S. 237, 247; *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571, 575 (C. A. 6). Moreover, "where * * * the language of the judgment [is] am-

[8] See the reference to such ambiguity in the material presented to the Department of Justice in 1950 by appellee Service in support of its filing of amended reports under the decree. Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, Part I, 85th Cong., 1st Sess., p. 294.

biguous, the statute may be looked to in aid of the judgment. * * *". *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F. 2d 871, 885 (C. A. 6), certiorari denied, 320 U. S. 800.

Viewed in the light of the complaint, the purpose of the statute, and the over-all design of the judgment, we believe that the clause was intended to limit the shipper-owner to a 7% return on investment, with appropriate adjustments in such return to reflect changes in the value of the investment resulting from changes in the valuation of the carrier's property.

The complaint in the case alleged that payment of any dividends by pipelines to their shipper-owners constituted an illegal rebate. The case was settled, however, by a dividend restriction limiting the shipper-owners to their "share" of 7% of the carrier's valuation. The policy of the Elkins and the Interstate Commerce Acts is that all shippers are to be treated alike and that carriers cannot give some shippers more favorable treatment than others. See *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 461–462. Furthermore, a dividend obviously may be a "device" for giving an illegal rebate under the Elkins Act. Cf. *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 308–309. The 7% dividend limitation may therefore be viewed as a compromise between the Government and the defendants by which the shipper-owners (1) were permitted to obtain a fair return on their pipeline investment (*i. e.*, 7%), and (2) tacitly recognized that returns of greater than 7% on investment would give them an unfair prefer-

ence over other shippers, and therefore were to be prohibited as rebates.[9]

But the 7% limitation cannot fairly be construed to permit shipper-owners to receive dividends which, in the case of Arapahoe, would result in a return of 50% or 70% on investment, within three years after it was made.[10] Under the district court's construction of the judgment, a shipper-owner's return on its investment would substantially increase whenever there was a significant increase in the carrier's debt. If the permissible dollar dividends of the shipper-owner can be increased by making the equity thinner, the 7% limitation in the decree serves substantially no purpose in accomplishing the over-all objective for which the suit was filed (and in the light of which the decree must be interpreted, see *supra*, p. 17), namely, to preclude the payment of dividends by the pipeline to the shipper-owner in such substantial amounts as to constitute rebates and discriminatory preferences forbidden by the Elkins Act and the Interstate Commerce Act. Indeed, the holding below that the judgment authorizes dividends yielding 7% on *valuation* involves the application, in an Elkins Act case dealing with dividend limitations, of a concept (rate of return on valuation) ordinarily associated with rate-making.

[9] The fact that the judgment was entered "without * * * adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue" is not inconsistent with this analysis.

[10] Indeed, appellees' construction of the judgment would permit several of the shipper-owners to receive substantially higher returns on investment.

We submit that the Government's construction is the only one that effectuates the basic purpose of the judgment to prevent shipper-owners from gaining an unfair competitive advantage over oil companies which do not have pipeline interests, through receipt of dividends which provide unduly high returns on investment.

2. We believe that the district court erroneously ruled that any ambiguity in the decree "had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years [since the decree was entered]." While it is true that during the period 1942 to 1957 some of the pipeline companies filed reports with the Attorney General indicating that they had calculated permissible dividends to their shipper-owners on the assumption that the judgment authorized dividends providing a return of 7% on the carriers' total valuation, the fact that the Government did not take judicial action with respect thereto until 1957 was not because it acquiesced in the defendants' construction of the judgment.

Initially, we note that it is only in recent years that the problem of "excessive" dividend payments has assumed serious proportions. When the judgment was entered on December 23, 1941, the latest published statistics of the Interstate Commerce Commission (as of December 31, 1940) showed that only two of the 52 pipeline defendants had funded debt owing to third parties, and that such debts were relatively small. Not until the latter part of the 1940s

did the pipeline defendants have substantial funded debt owing to third-persons. Furthermore, it is only in relatively recent years that the pipeline defendants, taking advantage of these changes in capital structure, made dividend payments flagrantly in excess of a 7% return on investment.

The enforcement activities of the Department of Justice with respect to the decree were fully described in the recent hearings (October, 1957) before the House Antitrust Subcommittee. See Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary, Part I, 85th Cong., 1st sess., *passim*. During the period 1942 to 1957, the Department repeatedly had under study various questions involving the defendants' non-compliance with the different provisions of the judgment. See, *e. g.*, *id.*, pp. 205, 211, 217, 246, 249. During that period, three investigations of possible violations of the judgment were conducted by the Federal Bureau of Investigation (two of them before 1953, *id.*, p. 376), "[n]umerous" letters of inquiry were sent to the defendants, and there were 31 "official interpretations" of various provisions of the judgment by the Department. *Id.*, p. 77. As Assistant Attorney General Hansen pointed out to the subcommittee, the Government delayed instituting enforcement proceedings until 1957 because it was of the view that the most effective method for dealing with the various violations which had come to its attention would be "one overall proceeding raising the myriad issues the decree might post [pose]" (*id.*, p. 28; see, also, pp.

218, 377). However, after further study it was decided that the "most effective enforcement" of the decree would "stem * * * from a series of separate enforcement actions designed to implement the decree's key provisions" (*ibid.*). The Government thereafter filed "four proceedings * * * to effectuate the decree" (*ibid*), three of which are involved in this appeal. In addition, Assistant Attorney General Hansen reported (*id.*, p. 32) that "we are investigating other situations in which there are possible judgment violations" (which he specified), and that "[w]ithin the near future I shall be prepared to report on the fruits of our studies in these areas." See similar statements at pp. 236, 244, 247, 334, 376.

We wish to make clear that the Government is not seeking to give its construction of the judgment any retroactive effect. We are concerned only with its prospective operation, and the sole purpose of these motions is to have the judgment applied in the future in a way that will avoid discrimination against oil company shippers who, although otherwise in a similar competitive situation to the shipper-owners, do not have any interest in the pipelines which transport their product.

If, as we believe, appellees are not now properly applying the judgment, we submit that even if it be assumed that the Government should have acted sooner to correct such misapplications, the lapse of time is immaterial. This is not a private suit for damages or one to adjust private rights, but a proceeding brought by the Government to protect public

interests, namely, to avoid prejudice to shippers who do not have pipeline interests. "[E]ven assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government" in a proper enforcement of this judgment "are not to be forfeited as a result." *United States* v. *California,* 332 U. S. 19, 39–40. For principles such as "acquiescence, laches, or failure to act," which might be applicable in private litigation, do not bar the Government from proceeding under federal law to enforce public rights. *Ibid.*

B. The decree defines valuation as the "final valuation" of each common carrier's property "owned *and* used for common carrier purposes" [emphasis added], as made by the Interstate Commerce Commission. The district court construed this language as permitting appellee Tidal to include in its valuation leased property which it used, but did not own, on the theory that since the Commission treats leased property as part of the carrier's valuation for rate making purposes, it is properly included as part of the carrier's valuation for purposes of calculating permissible dividends under the judgment.

We submit that this ruling was plainly erroneous. It ignores the fact that the judgment does not refer to the Commission's valuation of the carrier's total property, but only to the valuation of its property "owned and used" [emphasis added] for common carrier purposes. Slightly more than two years before the judgment was entered, the Commission had pub-

lished its valuation of Tidal (made as of December 31, 1934). This valuation was broken down into three categories of property: (1) "owned and used for common-carrier purposes"; (2) "owned but not used, out of service"; and (3) "used for common-carrier purposes, but not owned, leased from" Tide Water Oil Company and other private parties. *Tidal Pipe Line Company,* 48 I. C. C. Val. Rep. 303, 308. The same breakdown of the carrier's property into these three categories was made in the Commission's valuation reports of Tidal for subsequent years. 50 Val. Rep. 95, 100 (as of December 31, 1947); 53 Val. Rep. 159, 165 (1948); *id.,* pp. 166, 172 (1949); *id.,* pp. 173, 178 (1950); *id.,* pp. 180, 186 (1951); 54 Val. Rep. 493, 498 (1952); *id.,* pp. 855, 859 (1953).

In the circumstances, we submit that the reference in the judgment to property owned *and* used cannot be construed to embrace the category (which the Interstate Commerce Commission consistently has recognized) of leased property "used * * * but not owned." The fact that the Commission has included "used but not owned" property as part of the carrier's valuation for rate-making purposes does not mean that it may be included as part of property "owned and used" in construing that phrase in a judgment designed for entirely different purposes, namely, to prevent rebates (see *supra,* pp. 18–19). On the contrary, we believe that the limitation to property used *and* owned reflects the basic design of the judgment to limit shipper-owners to a reasonable return on their investment. See pp. 16–20, *supra.*

C. The judgment requires the carriers to adjust the Interstate Commerce Commission's valuations to reflect increases due to "additions and betterments," and decreases due to "depreciation on, and retirements," from year to year. However, the judgment further provides that these adjustments must be made by the carrier "as of the close of the next preceding year." Despite this clear language, the court held that appellee Service had properly calculated its permissible dividends on the basis of changes in its valuation which occurred in the following year. Although recognizing that "a literal construction" of the language "put[s] some doubt on the construction followed by Service," the court rejected what it deemed "too literal an interpretation of the decree" because of "the language and purpose of the decree as a whole."

We submit that neither the specific language itself, nor the "language and purpose of the decree as a whole," supports the court's ruling. The language is not ambiguous; it requires that adjustments be made "as of the close of the next preceding year," *i. e.,* as of December 31. The intent seems plain: the valuation is to be made as of the end of the year and not, for example, as of March 31.

The court's reliance on the "purpose of the decree as a whole" is in marked contrast to its treatment of the "share" provision involved in the Arapahoe motion. For, with respect to that provision, the court failed to consider the basic design of the decree as a whole, and instead gave the words a construction which, as we have shown (*supra,* pp. 16–20), would

result in making the decree largely ineffective to correct the evils which the suit was designed to eliminate.

CONCLUSION

We submit that this Court has jurisdiction to hear the appeal, and that the questions presented are substantial and of public importance. It is, therefore, respectfully submitted that probable jurisdiction should be noted.

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Assistant Attorney General.

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W. LOUISE FLORENCOURT,
Attorneys.

JULY 1958.

APPENDIX A

STATEMENTS OF THE DISTRICT COURT IN DENYING THE GOVERNMENT'S MOTIONS (TRANSCRIPT OF HEARINGS OF MARCH 24 AND 25, 1958)

The COURT. Does anybody else want to say something?

I have heard all of you gentlemen fully, and I must say that none of you has abused the privilege accorded you. I should say also that each of you has been helpful to the Court in presenting it with briefs setting forth your respective positions and attempting to show justification for the positions taken.

I have, by virtue of the time heretofore afforded me and the fact that these various memoranda were not dumped on me simultaneously, been able to keep abreast of you through those documents.

I reach the conclusion, fortified by the arguments of today, that this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties after due deliberation and approved by the Court in 1941 and again in 1942 by the supplemental order.

I do not treat the proceedings before me as asking for abandonment of the decree in toto. Actually, if I were required to act upon such a request, I would not hold that the decree as it has been interpreted by the parties over a period of sixteen years violates the Elkins Act. There has been no adjudication of the violations alleged in the original complaint herein. The consent decree was the vehicle by which the two sides attempted to ride out a situation where issues had been joined but never determined.

I have stated to you that I find no ambiguity in the terminology of the decree. I think it is clear upon its face; but even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years.

I have before me at the present time, I believe, three motions dealing with this aspect of the case. I think—with due respect to Judge Peck—there is a fourth one, which is in his motion. The other motion, I believe the record has been cleared of. That was the rule to show cause.

As to these three motions of the Government, I will deny them. From that action by the Court, it follows that I hold that the interpretation of the decree which Judge Peck requested in the Interstate and Tuscarora motion is the correct interpretation.

Unless there is something further from either side, I will take an order to that effect. [Tr. 134–135]

*   *   *   *   *

RULING OF THE COURT

The Court. Well, I do not say that your argument is without merit. But I do feel this, Mr. Karsted: Looking at the language and purpose of the decree as a whole, and considering the equities or inequities which would result by too literal an interpretation of the decree, and realizing that the purpose of the overall document is to allow a return to the companies pitched on the property currently used for public service, I do not feel that I am doing any violence to the decree as a whole when I construe it to permit that which has been done by Service and Standard of Indiana. Particularly, in view of the lapse of time and the complete and full disclosure of this interpretation

over the period of time, which has operated both for and against the company as the facts dictated and has been in conformity with Interstate Commerce accounting practices, I do not feel I would be warranted in upsetting on a literal construction of a few words, although they may, in my judgment, put some doubt on the construction followed by Service and Standard.

For that reason I will deny your motion insofar as it relates to Service Pipe Line Company and Standard Oil Company of Indiana.

Now that leaves for determination the matter which was heard last evening relating to Tidol and to Tidewater, as to which I have the following to say:

First, as to Tidol, I do not find that it has violated the consent decree by including in its valuation, for the purpose of computing the 7 per cent dividend permitted under the decree, property used for common carrier purposes but not owned by it.

The decree must be read as a whole. Paragraph III (a) defines "valuation" as "the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission," to which certain specific adjustments shall be made. The decree elsewhere refers to "the final valuation" of the common carrier's property as determined by the Interstate Commerce Commission and brought up to date through the accounting methods set forth in the Uniform System of Accounts for Pipe Lines prescribed by the I. C. C. I do not find any indication of an intent of the parties to the consent decree to utilize but one I. C. C. classification as the basic valuation.

However, if there be any ambiguity, the practice through the years has shown an acquiescence on the part of the Government in the interpretation placed on

the decree by Tidol. This being so, we do not reach the question of treble damages.

From what has gone before it follows that the Government is entitled to no relief against Tidewater. And, likewise, that the motion is denied as to Tidol.

I will take an order to that effect. [Tr. 250–252]

APPENDIX B

Section 6 (7) of the Interstate Commerce Act, 49 U. S. C. 6 (7), provides as follows:

> § 6 (7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sections 1 and 3 of the Elkins Act, 49 U. S. C. 41, *et seq.*, provides in pertinent part as follows:

> Section 1:
>
> § 41 (1) Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as

are prescribed in said chapter or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: * * * [49 U. S. C. 41 (1)]

* * * * *

§ 41 (3) Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43 of this title, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or other-

wise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be. [49 U. S. C. 41 (3)]

* * * * *

Section 3:

43. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having

jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that

such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided,* That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission. [49 U. S. C. 43]

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA

vs.

THE ATLANTIC REFINING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

MOTION TO AFFIRM SEPARATE ORDER AS TO SERVICE PIPE LINE COMPANY AND STANDARD OIL COMPANY (INDIANA).

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August 22, 1958.

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Citations.

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Pursuant to Rule 16, par. 1(c), appellees move that this court affirm the separate order as to Service Pipe Line Company and Standard Oil Company (Indiana) entered by the District Court in the above-captioned case on March 26, 1958. The Government has taken an appeal from this order under the Expediting Act, 49 U. S. C. § 45, in conjunction with its appeal from other orders entered by the District Court involving different issues.

The separate order with which this motion to affirm is concerned denied the request of the Department of Justice for an order directing Service Pipe Line Company to "carry out the judgment" entered in the above-captioned

cause and for other relief against the defendant Standard Oil Company (Ind.). Before the District Court, the Department conceded that its motion as to these appellees was based on a "hypertechnical" and "illogical" interpretation of a "minor" and "technical" provision of the consent judgment. The Department recognized that the interpretation which it challenged had been applied consistently by Service and Standard over many years with the full knowledge of the Department and with "overall net" results "adverse" financially to Service and Standard.

The Department's appeal from the instant order concerns different issues arising from different provisions of the judgment than those presented by the appeals relating to Arapahoe Pipe Line Company and the Tidal Pipe Line Company. Cf. *Holophane Co., Inc.* v. *United States*, 352 U. S. 903 (1956); *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76 (1950).

STATEMENT

On December 23, 1941, the Department of Justice and numerous corporations, including these appellees, agreed to a consent judgment terminating a proceeding instituted the same day by the Department. The complaint alleged, in essence, that the payment of customary dividends by pipe line companies to their parent corporations which transported petroleum products over their facilities constituted illegal rebates in violation of the Interstate Commerce Act and the Elkins Act. These appellees filed an answer denying the charges, but subscribed to the judgment which was entered "without trial or adjudication of any fact or law," "without admission by any party," and "in final settlement of all claims."

Paragraph III of the judgment, by way of compromise, limited the pipe line defendants to paying dividends to their parent corporations annually in an amount not ex-

ceeding 7% of the valuation of their properties utilized for common carrier purposes.* By paragraph VIII, reports were required to be filed with the Attorney General by April 15 of each year showing for the preceding calendar year the pipe line company's valuation, earnings, and dividend payments.

The valuation of the pipe line company's properties on which the permissible 7% dividend payment was to be based was described in paragraph III(a). In pertinent part, paragraph III(a) specified that

> "Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property *made after the date of such latest final valuation*, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, *computed by the carrier as of the close of the next preceding year*, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission." (Emphasis added.)

With respect to each year relevant to this appeal, the Interstate Commerce Commission had valued the properties of Service as they existed on December 31 of the previous year. In those years in which there were substantial additions and betterments, or retirements, during the course of the year, Service, in accordance with paragraph III(a), started with the "latest final valuation * * * as made by the Interstate Commerce Commission," then "added the value of additions and betterments * * * made

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* For the convenience of the Court, the relevant provisions of the judgment are reproduced as Appendix A, p. 13, *infra*.

after the date of such latest final valuation," and "from this sum" "deducted appropriate amounts" for retirements.

Moreover, Service undertook to compute the value of additions and betterments, or retirements, "as of the close of the next preceding year" as nearly as possible "in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date." Service computed the value of additions and betterments completed during the year by utilizing the period price indices used by the I. C. C. for the preceding year in making its valuations. Service treated retirements effected during the year in similar manner, by deducting the value of the retired properties as of the close of the next preceding year. Furthermore, to achieve a proper valuation as of the end of the next preceding year for facilities in use during only a part of the year, Service pro-rated the value of the additions and betterments completed during the year on the basis of the fraction of the year that such facilities were in use and contributed to earnings in the year for which permissible dividend payments were being determined. The value of retirements was in each instance also pro-rated to reflect the portion of the year that the retired properties were withdrawn from use and no longer contributed to earnings in the dividend year.

This valuation of properties on a pro-rata basis "as of the close of the next preceding year" in some years worked out to the advantage of Service, *i. e.*, when a substantial property was completed during the base year and thus increased the valuation, and worked to its disadvantage in other years, *i. e.*, when a substantial property was retired or abandoned during the year so as to reduce the valuation.*

* For example owing to the retirement of substantial properties during 1955, Service reduced its valuation on a pro-rata basis, as of the close of 1954 by over $14 million, a sum much larger than any amounts added to valuation in any year or over a period of years on account of pro-rata additions.

Besides filing its annual reports with the Attorney General, Service in 1951 and again in 1954 explained to the Department of Justice the pertinent details of its valuation procedures. The Department had previously examined Service's accounts in the course of a routine compliance check. These so-called enforcement proceedings were instituted by the Department in the District Court on October 11, 1957—on the eve of Congressional Committee hearings into the consent decree program of the Department of Justice.

In the Department's view, the valuation prescribed by the judgment precludes the reflection of any properties which were *not in actual use at the close of the year* preceding the one for which earnings and dividend payments are being computed. Conversely, the Department insists on the inclusion of the full value of properties in use at the close of the preceding year, even though abandoned and not used during the greater part of the year for which permissible dividend payments are being determined.

Department counsel conceded below that Service was "consistent" over the years in its manner of compliance with the judgment, which was advantageous to Service one year and disadvantageous in others, and agreed that the "overall net" result was "adverse" to Service and Standard. (Transcript of March 25, 1958, pp. 202-204.) Counsel admitted that the Department was urging a "hypertechnical construction of the judgment" which was "a little bit unreasonable." (Tr., p. 207.) If construed his way, Department counsel acknowledged that "the provision of the judgment is illogical." (Tr., p. 249.)

At the close of his argument, Department counsel was complimented by the court for having been "very frank" in recognizing that there was "very much equity" and "a great deal of merit in what Service has been doing." (Tr., pp. 211-212.)

The District Judge, being of the opinion that the pertinent provision of the judgment "is not too clear to me" (Tr., p. 249), rendered an oral ruling denying the Department's motion as follows:

> "Looking at the language and purpose of the decree as a whole, and considering the equities or inequities which would result by too literal an interpretation of the decree, and realizing that the purpose of the overall document is to allow a return to the companies pitched on the property currently used for public service, I do not feel that I am doing any violence to the decree as a whole when I construe it to permit that which has been done by Service and Standard of Indiana. Particularly, in view of the lapse of time and the complete and full disclosure of this interpretation over the period of time, which has operated both for and against the company as the facts dictated and has been in conformity with Interstate Commerce accounting practices, I do not feel I would be warranted in upsetting on a literal construction of a few words, although they may, in my judgment, put some doubt on the construction followed by Service and Standard." (Tr., p. 250.)*

* The appellant's suggestion here (Juris. Statement, p. 25) that the court undertook to depart from "clear language" is refuted by the court's observation that "if the terminology of this is clear I have nothing else to do, have I?" (Tr., p. 220.)

ARGUMENT.

As detailed below, the correctness of the order of the District Court denying the Department's request for a "hypertechnical" and "illogical" construction is manifest not only from the face of the judgment, but also in light of its consistent application over the years—sometimes to the benefit and sometimes to the detriment of these appellees. Moreover, the court's order on this phase of the judgment relates only to "technical" and "minor points," and is of minimal significance for the parties or the public. It reflects the District Court's application of elementary legal principles long recognized by this Court to a small facet of one of the numerous consent decrees on the dockets of the federal courts.

A: The Interpretation of the Consent Judgment Sought by the Department of Justice Is Concededly "Hypertechnical" and "Illogical"; on the Other Hand, the Sensible Interpretation Sustained Below Is One That Was Consistently Applied Over the Years With the Full Knowledge of the Department, and Actually Worked to the Net Financial Disadvantage of Service and Standard.

The correctness of the order below is manifest from the face of the decree.

In order to provide a realistic mechanism for the computation of the permissible 7% dividend which a pipe line company may pay annually to its corporate parent, the judgment specified procedures for keeping the valuation base current and up to date. Thus, paragraph III(a) pro-

vided that the latest final valuations of the Interstate Commerce Commission be increased by "the value of additions and betterments" of pipe line properties, and decreased by the value of property depreciation and retirements. This computation was to reflect a valuation "as of" the close of the year preceding the year for which the permissible dividends were being calculated.

Giving fair effect to the text of the provision for making valuation data current, it is apparent, as the court below ruled, that Service complied with its terms. Service did no more than ensure that the value of properties contributing to earnings for only part of a year be reflected proportionately in the base, computed "as of the close of the next preceding year," against which the permissible dividends for the year were measured.

By contrast, the Justice Department's contention, making paragraph III(a) operate in an admittedly "hypertechnical" and "illogical" manner, required the transposition of words in the judgment.

According to Department counsel, Service could not reflect the pro-rated value of additions or retirements consummated during the earning year because

> "In words that can't be misconstrued, the judgment says that valuation shall be valuation of property owned and used. Now, if during the calendar year being reported on, let's assume in the month of May Service put into operation an addition that is worth half a million dollars. That couldn't have any prorata value as of January 1st. It is true it had value as of January 1st because a half million dollar project isn't completed momentarily. So it was in existence at January 1st. It had value. It was owned, but it was not used. * * * So not being used as of January 1st how could it have any prorata value as of January 1st? If we are going to be very technical about the judgment our position is that it couldn't have." (Tr., pp. 205-206.)

This theory that only properties in use at the close of the prior year can be included within the valuation base is not just "very technical," but actually rearranges the words in paragraph III(a). In specifying the type of properties includible in the pipe line carrier's valuation, paragraph III(a) refers to such properties as are "used for common carrier purposes." But this provision relating to the particular *use of properties for common carrier purposes* significantly contains no limitation as to properties in use at the year's end, and is clearly separated in paragraph III(a) from the provision which specifies the *mechanics of computing a current value* for common carrier properties "as of the close of the next preceding year."

Furthermore, Service's interpretation and the reasons therefor were repeatedly disclosed to the Department of Justice. It is as likely to prejudice as to benefit Service in any given year, depending on whether pro-rata values of additions completed during the year are greater or less than the value of retirements effected sometime during the year.

Particularly when faced with a "hypertechnical" assertion by the Department of Justice, which concededly would make the judgment "a little bit unreasonable" and "illogical" in its application, the court properly took these factors into account in arriving at the meaning of a provision which the District Judge deemed "not too clear to me." Cf., *e. g.*, *United States* v. *Zucca*, 351 U. S. 91, 96-97 (1956); *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933).

B. Since No Novel or Controversial Principles of Law Were Applied by the District Court to Resolve the "Technical" and "Minor Points" in the Judgment Here Involved, the Appeal as to Service and Standard Does Not Warrant Plenary Consideration by This Court.

The appeal from the order below as to Service Pipe Line Company and Standard Oil Company (Ind.) involves nothing more than the correctness of the lower court's construction of an inconsequential provision of the consent judgment, and presents no legal issue of public or even private importance warranting plenary review by this Court.

The Department's separate motion, addressed only to Service and Standard, concerned matters characterized as "technical" and "minor points" by counsel for the Department of Justice. (Tr., p. 136.) Even now, the appellant's Jurisdictional Statement has relegated the appeal as to Service and Standard to a cursory discussion (pp. 25-26) which scarcely exceeds one page at the tail of its 26-page presentation.

Inasmuch as the construction of the provision in paragraph III(a) of the judgment at issue here may operate in any given year to the benefit or the detriment of these appellees depending on unpredictable future events, there is relatively little at stake financially. Nor is the interpretation of this provision capable of materially influencing the future administration of the judgment as a matter of overriding public concern.

The appeal from the orders as to these appellees presents no legal issue of substance. The District Court did not evolve or apply any novel or debatable legal doctrine. It simply confirmed the reasonable and sensible construction that had been uniformly applied over the years to a

minor and unimportant provision of a consent judgment. The legal principles involved in giving effect to the terms of a judgment are so elementary and settled that this Court since *Hughes* v. *United States*, 342 U. S. 353 (1952) has invariably disposed of comparable appeals without rendering an opinion. *E. g., Wometco Television & Theatre Co.* v. *United States*, 355 U. S. 40 (1957); *Holophane Co.* v. *United States*, 352 U. S. 903 (1956); *Liquid Carbonic Corp.* v. *United States*, 350 U. S. 869 (1955).

A host of "housekeeping orders" are issued each year by district courts in their administration of the hundreds of outstanding consent judgments between private parties and the Department of Justice. If the appeal from the instant order merits plenary review here, it is hard to conceive of any that would fail to warrant full-scale Supreme Court consideration on direct appeal under the Expediting Act.

CONCLUSION.

Inasmuch as the District Court's interpretation of the judgment provision relating to these appellees is clearly correct, and no substantial issue is presented which deserves plenary review, the separate order relating to Service Pipe Line Company and Standard Oil Company (Indiana) should be affirmed.

Respectfully submitted,

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August 22, 1958.

APPENDIX A.

The pertinent paragraphs of the consent judgment are:

III: No defendant common carrier shall credit, give grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum.

(a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission. Such valuation shall not include the value of the common carrier

facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account as provided in paragraph V hereof.

VIII. Each defendant common carrier shall render a report to the Attorney General of the United States not later than the 15th day of April of each year, showing for the preceding calendar year: the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof.

IN THE

Supreme Court of the United States

October Term, 1958.

No. 210

UNITED STATES OF AMERICA, *Appellant*,

vs.

THE ATLANTIC REFINING COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 210.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE ATLANTIC REFINING COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS OR AFFIRM.

The twelve undersigned are defendants in the consent judgment entered in the District Court in the above-entitled cause. They participated as parties in interest in the proceedings below by opposing appellant's "Motion for Order for Carrying Out Final Judgment" filed against Arapahoe Pipe Line Company and by securing an order granting separate affirmative relief similar to that obtained by Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Ltd.

Pursuant to Rule 16, the undersigned, while not questioning that this case is properly reviewable by this Court under the provisions of the Expediting Act, 15 U. S. C. 29; 49 U. S. C. 45, concur in the Motion to Affirm

filed in this Court by Arapahoe Pipe Line Company and in the Motion to Dismiss or Affirm filed by Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Ltd., and pray for similar relief for the reasons stated in the respective motions in support of dismissal or affirmance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA

v.

THE ATLANTIC REFINING COMPANY, ET AL.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO AFFIRM SEPARATE ORDER AS TO TIDAL PIPE LINE COMPANY AND TIDEWATER OIL COMPANY

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August 22, 1958.

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CITATIONS

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MOTION TO AFFIRM SEPARATE ORDER AS TO TIDAL PIPE LINE COMPANY AND TIDEWATER OIL COMPANY

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees Tidal Pipe Line Company (hereinafter called "Tidal") and Tidewater Oil Company (hereinafter called "Tidewater") move that the separate final order of the district court denying appellant's "Motion for Order for Carrying Out the Final Judgment Entered in the Above Cause on

December 23, 1941", against Tidal and Tidewater, be affirmed.

STATEMENT

This is a direct appeal from three final orders entered in the district court upon separate motions filed on October 11, 1957, for "enforcement" of a consent judgment. Three separate cases are joined in this single appeal. The several motions were filed against different parties to the judgment, and were separately pleaded and argued. They were denied *in toto.* Copy of the order denying the motion against Tidal and Tidewater is printed as Appendix A hereto. This Motion to Affirm is directed solely to the appeal from the separate order denying the motion against Tidal and Tidewater.

Each of the three cases involves different questions, but they are related insofar as they all arise under the provisions of the final judgment entered in the district court, on consent, on December 23, 1941, in *U. S. A.* v. *The Atlantic Refining Company, et al.*, Civil Action No. 14060, the relevant portions of which are printed as Appendix B hereto.

In that action, commenced on December 23, 1941, appellant filed a complaint, asserting broad claims of violations of the Interstate Commerce and Elkins Acts, against a large number of common carrier oil pipeline companies subject to the jurisdiction of the Interstate Commerce Commission and their respective oil company shipper-owner or owners. Included among the defendants were Tidal, a common carrier oil pipeline company, and Tidewater (then named "Tide Water Associated Oil Company"), its shipper-owner. Prior to the filing of such complaint, the United States and all the defendants had agreed upon

a judgment expressed as being in "final settlement" of the asserted claims, which defined the maximum dividend payable by a common carrier oil pipe line to its shipper-owner or owners. Accordingly, on the same day when the complaint was filed the defendants immediately filed answers denying the asserted claims and the consent judgment of December 23, 1941 was entered. In the judgment the court expressly disclaimed any adjudication of the issues of fact and law raised by the complaint and answers. See Juris. Statement, p. 4, fn. 1.

The pertinent facts of the instant case involving Tidal and Tidewater are as follows:

Paragraph III of the consent judgment provides in effect, that Tidal may not pay its stockholder Tidewater in any year (commencing with 1942) any dividends "in excess of its share of seven percentum (7%) of the valuation" of Tidal's property "but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to pay said percentum". "Valuation", in the consent judgment, is defined as follows: "Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission".

The theory of the consent judgment was that net common carrier earnings in excess of the amount permitted to be paid as dividends under Paragraph III would be retained and transferred to a special surplus account, authorized uses of which were specifically and drastically limited.

Paragraph VIII of the consent judgment requires reports annually to the Attorney General of (1) the

valuation used as earnings basis; (2) total earnings available for distribution; (3) earnings, dividends, etc., paid; and (4) amounts transferred to or withdrawn from the special surplus account.

Before the consent judgment was entered (and since), the Interstate Commerce Commission, in valuing the property of common carrier oil pipelines under the mandate of Section 19a of the Interstate Commerce Act,[1] included in such valuations the value of property leased by the carriers and used for common carrier purposes, in addition to the value of property *both* owned *and* used for common carrier purposes.

Thus in the case of Tidal, the Commission, in 1939, valuing Tidal's common carrier properties as of December 31, 1934, stated in its report:

> "Final Value.—After careful consideration of all facts herein contained, including appreciation, depreciation, going-concern value, working capital, and all other matters which appear to have a bearing upon the values here reported, the values for rate-making purposes, as of December 31, 1934, of the property owned or used by the carrier, are found to be as follows:"

Following the above quotation, the report contains a tabulation of the final value. The last figure in the "final value" tabulation is $2,001,002.00, which includes $2,000,000.00 of property *both* owned *and* used,

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[1] So far as pertinent the Section provides (49 U. S. C. 19a):

> "Section 19a. Valuation of Property of Carriers.
> (a) *Physical valuation of property of carriers; classification and inventory.*—The Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this chapter; * * *"

and $1,002.00 of property used but not owned. *Tidal Pipe Line Company,* 48 I. C. C. Val. Rep. 303,308.

Tidewater construed the judgment as permitting inclusion in the permissible dividend computation base of all of its property devoted to the performance of common carrier service, including property *both* owned *and* used and property used but not owned, *i.e.,* leased property. It applied this construction consistently throughout the years. Valuation of such property was made in accordance with Interstate Commerce Commission methods and practices, as required by the judgment. Earnings in excess of 7% of such base valuation were transferred to a special surplus account.

Tidal's practice of including leased property in its base valuation was disclosed to the Attorney General in reports filed pursuant to paragraph VIII of the judgment. Copies of the reports were before the court below and are in the record on this appeal.

The report filed in 1943 for the year 1942 did not include any valuation of leased properties, for none were then involved. The reports filed in 1944 and 1945 for the years 1943 and 1944, respectively, did have a schedule which disclosed on its face that Tidal was including property used—but not *both* owned *and* used—in its valuations upon which its permissible dividends were calculated. Beginning in 1946, Tidal changed its form of reporting and set forth in its annual reports for each of the years 1945, 1946, 1947 and 1948 a composite valuation figure, not unequivocally reflecting that Tidal was including leased property in its valuations. The valuations in these reports filed prior to 1950 were, in accordance with Paragraph III(a) of the judgment, based on the latest values placed on Tidal's properties by the In-

terstate Commerce Commission in its 1934 report and upon Tidal's estimated value of additions and betterments to its properties since the Interstate Commerce Commission's valuation report in 1934. In December, 1949, the Interstate Commerce Commission notified Tidal of the valuations it had placed on Tidal's properties as of December 31, 1947. The valuations found by the Interstate Commerce Commission reflected Tidal had underestimated the value of the additions and betterments made to its properties, and as a result, Tidal revised all of its reports previously filed with the Attorney General. This was done in September, 1950, when Tidal filed with the Attorney General a separate revision of each of the former reports, covering the years 1943 to 1948, inclusive, incorporating therein the adjusted valuations. Each of these revisions fully disclosed that valuations of property used but not owned were being included in Tidal's computation of permissible dividends. Similar reports making such disclosure were filed for each subsequent year up to and including 1956.

The appellant's motion below against Tidal and Tidewater, filed October 11, 1957, challenged the inclusion of leased property in the dividend base. The amounts involved are not considerable. The motion charged that Tidal failed to place in its special surplus account over a period of several specified years sums aggregating $30,075 of earnings which allegedly should have been so segregated, and that of such sum $20,776.30 was paid to its shipper-owner as a dividend.

The claimed over-payment to Tidewater relates to a single dividend, which was declared and paid in 1953. Up to that time appellant had never questioned Tidal's construction of the judgment, despite the demonstration of its construction which had been fully

and repeatedly made in its reports to the Attorney General.

On March 15, 1954,[2] Tidal received a letter from an Assistant Attorney General questioning its inclusion of leased properties in the dividend base (Tidal—Exhibit G).[3] Tidal responded, explaining its construction of the judgment and the reasons therefor, and requesting that, upon further consideration of the matter, it be further advised "as to your position". (Tidal—Exhibit H). This letter received neither acknowledgment nor response. Tidal's report for the year 1954, which again fully disclosed that leased property was included in the base, was filed in due course early in 1955. Thereafter, on September 23, 1955, Tidal received a letter from the Assistant Attorney General again questioning inclusion of leased property in the base, but making no reference to Tidal's response to the March 1954 letter (Tidal—Exhibit I). Tidal again promptly responded, calling attention to and enclosing a copy of its earlier communication and again asking that the matter be reviewed and that Tidal be advised "as to your position". (Tidal—Exhibit J). This reply, also, was neither acknowledged nor answered. Tidal's 1955 report was filed in early 1956 in the same form as the previous reports, again plainly disclosing that leased property values were used. The same is true of the 1956 report filed in early 1957. Still nothing was heard from the Attorney General's office, until late September, 1957. That communication (Tidal-Exhibit K) made no demand upon Tidal. In fact, it carried an invitation "to discuss the matter with us". Responding to this in-

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[2] The letter is erroneously dated March 10, 1953. It should have been dated March 10, 1954.

[3] References are to exhibits to Tidal's Response below to the appellants Motion against Tidal and Tidewater.

vitation Tidal's counsel met with representatives of the Attorney General in Washington on October 10, 1957, "to discuss" the matter. On the following day the Government filed this motion, together with the other motions involved in this appeal.

ARGUMENT

The judgment, in paragraph III, limits dividends from transportation revenues to 7% of the Interstate Commerce Commission valuation of "such common carrier's property". The agreement of the parties in entering into the consent judgment was that all properties producing transportation revenues were to be included in the base upon which the 7% was to be computed, and at the valuation of those properties made by the Interstate Commerce Commission.

References to I. C. C. methods and practices permeates that portion of the judgment. Historically, the concept of "common carrier's property" has been treated by the Commission, acting under the mandate of Section 19a of the Interstate Commerce Act (*supra*, fn. 1), as including all property productive of transportation revenues, whether owned *or* used. Thus, prior to the effective date of the consent judgment (and since), the Commission, in valuation proceedings, included (and includes) leased property used for common carrier purposes in the valuation base. Section 19a of the Act is entitled "Valuation of Property of Carriers", and the significant words "*property of carriers*" as there used clearly comprehend leased property. The section requires the Commission to investigate, ascertain and report "the value of all of the property owned or used by every common carrier"; to keep itself informed of all new construction, extensions, improvements, requirements or other

changes, and when necessary, to revise and supplement its valuations. The procedures, methods and factors to be taken into consideration are spelled out in detail.

The appellant seeks to limit the generality of the words "common carrier's property" on the ground that in the definition of "valuation" in the judgment the word "and" was used between the word "owned" and the word "used", instead of "or". We submit, however, that this question presents no substantial issue.[4]

It should be noted that the definition of the word "valuation" does not purport to define or delimit the words "such common carrier's property". Had a limitation on the generality of those words been intended, clarity would have required that the terms to be defined be expanded to include "valuation *of such common carrier's property*". Put another way, the definition limits what is meant by the word "valuation", but does not limit the generality of the words descriptive of the property which is to be included in the valuation.

The court below followed the cardinal rule for construction of the meaning of written instruments: it examined the judgment as a whole, finding that "the purpose of the overall document is to allow a return to the companies pitched on the property currently

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[4] In erecting its construction of the judgment upon the use of the word "and" in the definition of the word "valuation", appellant leans upon a slender reed. In many cases, courts have given to the word "and" significance as a disjunctive. See *Hensel, Bruckmann & Lorbacher v. U. S.*, 126 Fed. 576 (Cir. Ct., N. Y.); *Northern Commercial Company, et al., v. U. S.*, 217 Fed. 33 (CCA. 9th Cir.); *Crompton & Knowles Loom Works v. Stafford Company*, 205 Fed. 925 (D. C., Mass.).

used for public service".[5] It properly determined that "the decree must be read as a whole", and in so reading did "not find any indication of an intent of the parties to the consent decree to utilize but one I. C. C. classification as the basic valuation". The District Court took cognizance of the fact that the "final" valuation of a common carrier's property arrived at by the Interstate Commerce Commission includes not solely property *both* owned *and* used but also leased property *used* for common carrier purposes. The court further took into account the fact that the judgment requires certain specific adjustments to be made to the Commission's final valuation figure, but apparently found it significant that there was no requirement spelled out in the judgment for deduction of property used but not owned.

Moreover, the District Court found support for its construction in the fact that "the practice through the years has been an acquiescence on the part of the Government in the interpretation placed on the decree by Tidal". That this was proper, see *U. S.* v. *Chicago North Shore & Milwaukee Railroad Co.,* 228 U. S. 1 (1933); *U. S.* v. *Leslie Salt Co.,* 350 U. S. 383 (1956). No satisfactory explanation for the years of delay of the appellant in raising this issue was presented to the court below.

Without substance is the appellant's contention in the Jurisdictional Statement, p. 24, that "limitation to property owned *and* used reflects the basic design of the judgment to limit shipper-owners to a reasonable return on their investment". The short answer to this proposition is that there is no such "basic design"

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[5] Transcript of hearing of March 24, 1958, pp. 250/251; Juris. Statement, Appendix A.

reflected in the judgment, which limits dividends to a fixed return on Interstate Commerce Commission valuation of common carriers' property, nowhere relating such return to "investment". That this proposition advanced by the appellant is wholly fallacious is fully established in the Motion to Affirm of Arapahoe Pipe Line Company and the Motion to Dismiss or Affirm of Interstate Pipe Line Company and Tuscarora Pipe Line Company, Ltd., both filed in this Court upon this appeal. To conserve the Court's time, we refrain from repeating these arguments, but rely upon and adopt the showings made therein.

There were no disputed questions of fact before the court below. In the circumstances, the court was obliged merely to find what the parties had meant when, in a judgment arrived at by consent, they used certain words. Determination of that question called for the application of but elementary, long-settled principles of law in construing a relatively minor aspect of a particular instrument. It is manifest, we submit, that the appeal presents no question of sufficient importance to warrant review by this Court.

CONCLUSION

For the foregoing reasons, we submit that the appeal presents no substantial question, that the decision below is clearly correct, and that the questions involved do not call for review by this Court. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees
Tidal Pipe Line Company and
Tidewater Oil Company

August 22, 1958.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 14060

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE ATLANTIC REFINING COMPANY, *et al.*, *Defendants*.

Order

Plaintiff having moved, on October 11, 1957, for an order directing Tidal Pipe Line Company to carry out the judgement herein entered December 23, 1941, and for such relief against Tidewater Oil Company as the Court deems appropriate and proper under the circumstances; Now,

Upon the final judgment entered on consent December 23, 1941, the motion of plaintiff entitled "Motion for Order for Carrying Out the Final Judgment Entered in the Above Cause on December 23, 1941" against Tidal Pipe Line Company and Tidewater Oil Company filed October 11, 1957, the verified response of Tidal Pipe Line Company and Tidewater Oil Company filed January 20, 1958, and the appendix to the brief of Tidal Pipe Line Company and Tidewater Oil Company filed March 24, 1958; AND

After hearing counsel for the plaintiff and for the defendants Tidal Pipe Line Company and Tidewater Oil Company upon the foregoing record, and there being no disputed questions of fact, and the Court upon due consideration having rendered its opinion on March 25, 1958, it is this 26th day of March, 1958,

ORDERED that plaintiff's motion for an order directing Tidal Pipe Line Company to carry out the judgment herein entered December 23, 1941, and for such relief against Tidewater Oil Company as the Court deems appropriate and proper under the circumstances, be and the same hereby is, in all respects, denied; and it is further

Ordered that the valuation of Tidal Pipe Line Company's property on which the shipper-owner's permissible dividends may be computed is the valuation as provided in the judgment entered December 23, 1941, of all property used by it for common carrier purposes, whether owned by it or not.

S) Richmond B. Keech
Judge

S) Seen Alfred Karsted

APPENDIX B

Excerpts From Consent Judgment Entered December 23, 1941, in the District Court of the United States for the District of Columbia, Civil Action No. 14060, United States of America v. The Atlantic Refining Company, et al.

* * * * *

III. No defendant common carrier shall credit, give, grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant, or pay said percentum.

(a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such

latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission. Such valuation shall not include the value of the common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account as provided in paragraph V hereof.

(b) In event the Interstate Commerce Commission has not determined the final valuation of the property owned and used for common carrier purposes by any common carrier, and until such time as the Interstate Commerce Commission has determined the final valuation of such common carrier's property, the valuation shall be determined by the common carrier and shall be based upon the records and accounts of the carrier kept in accordance with the accounting methods set forth in the Uniform System of Accounts for Pipe Lines prescribed by the Interstate Commerce Commission. To this determination of valuation by the common carrier shall be added the value of additions and betterments to the common carrier property made after the date of such determination, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed as of the close of the next preceding year, in accordance with the Uniform System of Accounts for Pipe Lines prescribed by the Interstate Commerce Commission. Such determination of valuation shall not include the value of the common carrier facilities acquired through the investment of excess earnings

transferred to and withdrawn from the surplus account, as provided in paragraph V hereof.

(c) Any amounts permitted to be credited, granted, paid or given during any calendar year as hereinabove provided, if earned and withheld, may be credited, granted, paid or given any time thereafter in addition to credits and payments permitted during such subsequent years, unless (i) such earned and withheld sums shall have been invested in common carrier facilities and (ii) included in valuation as above defined.

(d) Any amounts permited to be credited, granted, paid or given during any calendar year as hereinbefore provided, if not earned, may be credited, granted, paid or given within any one or more of the next succeeding three years, in addition to credits and payments permitted during each such subsequent year.

* * * * *

VIII. Each defendant common carrier shall render a report to the Attorney General of the United States not later than the 15th day of April of each year, showing for the preceding calendar year: the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments, or benefits credited, paid, granted, or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof.

* * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958 No. 210

United States of America,
Appellant,
v.
The Atlantic Refining Company, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION OF ARAPAHOE PIPE LINE COMPANY TO AFFIRM ORDER OF DISTRICT COURT

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August 22, 1958

Press of Allen, Lane & Scott, Philadelphia

INDEX

Citations

CASES:

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On Appeal from the United States District Court for the District of Columbia

MOTION OF ARAPAHOE PIPE LINE COMPANY TO AFFIRM ORDER OF DISTRICT COURT

Appellee, Arapahoe Pipe Line Company (Arapahoe), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the Court affirm the order of the United States District Court for the District of Columbia entered March 25, 1958 which denied in all respects Appellant's "Motion For Order For Carrying Out Final Judgment" against Arapahoe. Arapahoe's ground for this motion to affirm is that the question on appeal as to Arapahoe is so unsubstantial as not to need further argument.

OPINION BELOW.

The opinion of the District Court was dictated from the bench at the conclusion of the hearing, and insofar as

it pertains to Arapahoe is set forth in Appendix A, *infra*, page 29. Said opinion was supplemented and confirmed by the District Court's Order of March 25, 1958, which is set forth in Appendix B, *infra*, page 31.

STATUTES INVOLVED.

The pertinent provisions of the Elkins Act are printed in the jurisdictional statement filed by the appellant (page 31). Pertinent provisions of the Interstate Commerce Act, 49 U. S. C. § 1, *et seq.*, are set forth in Appendix C, *infra*, page 33.

QUESTION PRESENTED.

In 1941 the Government filed a suit under the Elkins Act charging common carrier pipelines with making rebates, in the guise of dividends, to stockholders shipping over their lines (shipper-owners). Simultaneously, as a result of extensive negotiations, a consent judgment was entered prohibiting the carriers from paying dividends to any shipper-owner "in excess of its share of seven depercentum (7%) of the valuation" of the carrier (defined to mean the valuation made by the I. C. C.).

For sixteen years thereafter the defendants and the Department of Justice uniformly interpreted the consent judgment to mean exactly what it says—that dividends are permitted up to 7% of full I. C. C. valuation and without reduction on account of any indebtedness of the carriers. In 1942 the court which had entered the consent judgment made a supplemental order consistent only with this interpretation.

In 1957 the Government filed a motion seeking to require Arapahoe (a carrier), before computing permissible dividends, to deduct from valuation "the share of such valuation that is the result of or attributable to

monies obtained by the carrier from third parties"—*i.e.*, Arapahoe's outstanding indebtedness. That motion was based on an interpretation of the consent judgment which was completely inconsistent with the uniform construction placed upon the judgment by the defendants and the Department over the preceding sixteen years.

The District Court denied the motion, finding on undisputed facts that the consent judgment is "clear upon its face". It added that even if there had been an ambiguity, it had been "resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years" and that the court did not have the right to rewrite the agreement embodied in the consent judgment.

The Government has filed an appeal which does not seriously challenge the conclusions of the District Court, but instead advances a second new interpretation of the consent judgment and urges that it be adopted in order to accomplish "the over-all objective for which the suit was filed", *i. e.*, the suit filed in 1941.

The issue to be decided on this motion to affirm is whether there is a substantial question needing further argument with respect to the meaning of the consent judgment when the language of the judgment is so plain that the Government's only recourse on appeal is (1) in effect, to repudiate the judgment itself; and (2) to propose for the first time a new interpretation which escaped its attention not only during sixteen years of administration, but also in the preparation of the case below.

COUNTER-STATEMENT OF THE CASE.

This motion by Arapahoe relates solely to the first of the orders of the District Court which the Government seeks to review (jurisdictional statement, page 3). It does not relate to the orders entered in the proceedings against Tidal Pipe Line Company and Service Pipe Line Com-

pany—which were issued after separate hearings and involve completely different questions under the consent judgment. The circumstances of the entry of the orders and this appeal are as follows:

In September of 1940 the Government filed test suits under the Elkins Act charging certain common carrier pipelines with making rebates, in the guise of dividends, to stockholders shipping over their lines (shipper-owners). Numerous similar complaints against other companies had been prepared but were withheld from filing.

During the following year (1941) a settlement of the controversy was negotiated. A complaint embodying the same theory as the original test cases was filed against some 52 common carrier pipelines and their shipper-owners. The Government prayed for an injunction against future dividends and sought a recovery of treble the amount of dividends paid within the statute of limitations. Simultaneously, a consent final judgment was entered by the District Court without trial and without admission by any party in respect of any issue. The operative provisions of the consent judgment are set forth in Appendix D, *infra*, page 40.

Paragraph III of the consent judgment provides that no defendant common carrier shall pay to any shipper-owner in any calendar year any dividends "which in the aggregate is in excess of its [the shipper-owner's] share of seven percentum (7%) of the valuation" of such common carrier's property, "but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to * * * pay said percentum." Valuation is defined as "the latest final valuation of each common carrier's property * * * as made by the Interstate Commerce Commission."*

* Paragraph III is supplemented by Paragraph V, which requires segregation of earnings in excess of amounts permitted to be paid as dividends and places strict limitations on the uses that can be made of such segregated earnings.

This 7% limitation on dividends represented a compromise. As this Court is aware, pipeline rates and practices have been subject to I. C. C. regulation since 1906. Before completion of the negotiations for settlement of the Elkins Act suits, the Commission entered orders in unrelated proceedings finding that pipelines were characterized by "hazards and uncertain future" and that, for rate making purposes, returns to carriers of 8% and 10% on valuation were reasonable for crude oil* and petroleum products† lines, respectively. These orders showed affirmative consciousness of the fact that virtually all pipelines are built and owned by shippers and that many pay substantial dividends to their stockholders. The negotiators for the oil industry in the Elkins Act cases contended that the rate of return to the carriers approved in the I. C. C. proceedings should form the basis of any limitation on dividends in those cases. The Department of Justice, starting with a low percentage, eventually suggested a dividend limitation equal to 6% of valuation for both crude and products lines. The industry then made a counter proposal of 8%. After an impasse, the Attorney General himself suggested a 7% compromise—which was accepted by both sides and embodied in the consent judgment.‡

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* *Reduced Pipe Line Rates and Gathering Charges*, 243 I. C. C. 115 (1940). A final order was issued in 1948, 272 I. C. C. 375, finding that the crude oil pipeline rates in question had been continuously reduced and had not been shown to be unlawful.

† *Petroleum Rail Shippers' Assn.* v. *Alton & Southern Railroad*, 243 I. C. C. 589 (1941).

‡ This summary of the negotiations is based on the statements at the hearing before the court below by Charles I. Thompson, counsel for Arapahoe, who was Secretary of the Industry Negotiating Committee, and on Mr. Thompson's testimony at the hearings before the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, 85th Cong. 1st Sess., 1247 (1957). It will be noted that the Government's jurisdictional statement does not directly challenge Mr. Thompson's recollection. It merely advances the thought (page 18) that the 7% dividend limitation "may * * * be viewed" as a different compromise.

Both the rate of return stated in the I. C. C. proceedings and the 7% dividend limitation in the consent judgment were related to the valuation of the pipelines which the I. C. C. is required to make and publish for all carriers under Section 19a of the Interstate Commerce Act. The reports required to be made by that section describe in detail various classes of property owned or used for common carrier purposes; capital stock and long-term debt; earnings; and dividends. The Commission does not make, and never has made, any reduction in the value of property or in the reasonable rate of return to the carrier on account of any debt the carrier may have outstanding.

In 1941, when the consent judgment was entered, several of the defendant common carriers had outstanding indebtedness, and most of them have since borrowed substantial sums from time to time. The existence of such indebtedness has always been a matter of public record and well known to the Department of Justice.

Paragraph VIII of the consent judgment requires each carrier to render an annual report to the Attorney General showing its computation of the 7% dividend permitted by Paragraph III. In such reports Arapahoe and the other carriers have invariably computed permissible dividends at 7% of full I. C. C. valuation without any reduction on account of debts. The Attorney General, during the sixteen years from the entry of the consent judgment until this proceeding, acquiesced in the reports as filed. In addition, the Attorney General on numerous occasions took affirmative action showing that his interpretation of the consent judgment was identical with that placed on it by defendants.

On August 3, 1942 the District Court, on petition of Great Lakes Pipe Line Company, entered a supplemental order approving a financing plan which directly involved the effect of the original consent judgment on debt and dividends. The supplemental order is consistent with the interpretation placed upon the original con-

sent judgment by all parties over the sixteen-year period and inconsistent with the interpretation now sought to be placed upon it by the Government.

Arapahoe, a common carrier of crude oil by pipeline, was organized in 1954. Its stock is owned by two companies (Pure Oil Company and Sinclair Pipe Line Company) who are shipper-owners for purposes of the judgment.* Upon its incorporation it borrowed 26 million dollars to construct carrier facilities.

Arapahoe, as a new pipeline with no established business or record of earnings, could not have borrowed on its own credit. Accordingly, a Sinclair subsidiary and Pure entered into a "through-put" agreement with Arapahoe which committed the oil companies to ship enough oil through Arapahoe's line at its published tariff rates so that Arapahoe would have revenues to meet its obligations. Thus, the contribution of Pure and Sinclair is not limited to their cash investment in Arapahoe; they assumed the entire risk of the enterprise.

In organizing Arapahoe and making their investment, Pure and Sinclair relied upon the uniform interpretation of the consent judgment by the parties. In its annual reports to the Attorney General, Arapahoe has computed permissible dividends at 7% of its I. C. C. valuation without any reduction on account of its debt.

On October 11, 1957, sixteen years after the consent judgment was entered, the Government filed a motion for an order directing Arapahoe

> "before computing the permissible dividends for its shipper-owners, to deduct from the valuation of its property owned and used for common carrier purposes the share of such valuation that is the result of

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* Pure Oil Company (Pure) was one of the original defendants. Sinclair Pipe Line Company is one of several subsidiaries of Sinclair Oil Corporation, which, under its former name Consolidated Oil Corporation, was also one of the original defendants. Sinclair Oil Corporation and/or its various subsidiaries are hereinafter referred to as "Sinclair."

~~or attributable~~ attributable to monies obtained by the carrier from third parties for extending existing or constructing or acquiring new common carrier facilities, * * *"

In plain words, the Government sought to require Arapahoe, in computing permissible dividends, to reduce its valuation by some amount because of its debt.

There was no charge that Arapahoe had paid excessive dividends. The undisputed fact is that Arapahoe is a company with a high debt ratio and has largely utilized its earnings to service the debt. Its dividends paid to its shipper-owners have averaged about 1% of its valuation.

Arapahoe filed a verified response to the Government's motion. Subsequently, 12 other companies became active participants in support of Arapahoe's position, and two other companies, Interstate Oil Pipe Line Company (Interstate) and Tuscarora Pipe Line Company, Limited (Tuscarora), filed a petition to raise the question of construction posed by the proceeding against Arapahoe.* On March 24, 1958, a full day's hearing was held upon the issue involved in the Arapahoe case. All pleadings, statements, affidavits and briefs had been filed well in advance of the hearing date, and the District Court had, as it noted in its opinion (*infra*, page 29), gained a thorough advance knowledge of the positions of the parties. At the conclusion of the hearing the Court dictated its opinion from the bench, and the following day (March 25th) confirmed and supplemented the opinion by an order denying the relief sought against Arapahoe—which is the order the Government seeks to review.

The Government's motion asked the District Court to require Arapahoe to make a deduction from its I. C. C. valuation before computing permissible dividends to Pure and Sinclair. The Department sought to support this request by adroitly juggling the word "share" and asking

* See Motion to Dismiss or Affirm filed in this Court by Interstate and Tuscarora.

the District Court to hold that the words "its share of 7%" of I. C. C. valuation somehow required the deduction of a "share of such valuation."* In its motion and brief before the District Court the Department conceived various shares of valuation which, it contended, should either be deducted from valuation or used directly as the valuation base in computing permissible dividends. However, it consistently maintained throughout the proceeding below that "valuation" as used in the judgment must be divided into "shares" when the carrier is indebted.

The District Court unequivocally rejected the Department's contention.†

With respect to the practical construction of the consent judgment by the parties, the court said (*infra*, page 30):

> "I have stated to you that I find no ambiguity in the terminology of the decree. I think it is clear upon its face; but even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years."

* The Department was so casual about the language of the consent judgment that in its brief below it erroneously quoted the phrase "share of the carrier's valuation" as being used in the consent judgment—where in fact the phrase does not appear.

† The District Court's order then proceeded to grant the relief sought by the other companies which had participated in the proceedings and to construe the consent judgment in accordance with the uniform interpretation placed thereon over the preceding sixteen years, ordering that:

> "the valuation of common carrier's property on which the shipper-owner's permissible dividends may be computed is the valuation of the carrier's property as provided in the judgment entered December 23, 1941 without deducting the amount of any indebtedness from such valuation; * * *"

and further ordering that the carriers be permitted to pay dividends to their respective shipper-owners on the basis of the foregoing computation. As shown by the Motion to Dismiss or Affirm filed by Interstate and Tuscarora, these parts of the District Court's order were not appealed from and are therefore final.

On appeal, the Department takes no issue whatever with the holding of the District Court that "valuation" as used in the judgment does not mean valuation less some share thereof on account of debt. On the contrary, it has shifted its ground and now urges that "share of 7%" comprehends a deceptively simple ratio between the shipper-owner's "investment" and the carrier's "total invested capital," and that this ratio must be applied to 7% of the full I. C. C. valuation.* It states (jurisdictional statement, page 16):

> "We submit that under this provision a shipper-owner's '*share*' of 7% of the valuation of the pipe-line's property is the proportion which its investment in the carrier bears to the latter's total invested capital * * *." (Emphasis added.)

It then applies its new interpretation to a hypothetical case in which the valuation base for computing permissible dividends is conceded to be I. C. C. valuation, but under which each shipper-owner may "share" in the 7% only according to its investment.

This hypothetical case (jurisdictional statement, page 16) is no more than a "horrible example" based on the silent premise that there is something wrong in making money on borrowed money. It does, however, spotlight one important respect in which the Government's interpretation of the consent judgment clashes with the plain words of the judgment. The judgment, after limiting dividends to "seven percentum" of valuation, affirmatively permits the carriers to pay "said percentum." Said percentum will always be a dollar amount equal to

* This ratio was foreshadowed in the Department's brief below (page 4) as one of the variations upon the Department's interpretation of "valuation." However, consistent with its then position, the Department proposed below that the ratio be applied to valuation and not to permissible dividends.

.07 times valuation, and in the hypothetical case the Government computes this amount at $2,800,000, saying: "the permissible dividends would be 7% of the total valuation of $40,000,000, or $2,800,000." By applying its ratio, it then reduces the dividends which the two shipper-owners (owning all the stock) can receive to $280,000—leaving in limbo $2,520,000 out of the $2,800,000 which the consent judgment would affirmatively permit to be paid if the carrier had been as fantastically successful as the Government supposes.*

The Government conceded in its reply brief below that the relief sought may present "difficult situations involving intricate problems." It never fully explained how the various versions of its former interpretation would apply to these problems, and it does not explain how its new interpretation would be applied. It is therefore impossible to say whether the new interpretation would have the same effects as the old. It does seem obvious, however, that the Department is moving from one position to another as its earlier positions become untenable. It is also obvious that these changes are not new legal arguments; that they are, rather, fundamental changes in interpretation which would necessitate a revision of the relief sought and might well have different effects upon the carriers. The fact that the Government's position is subject to change in this fashion is the best possible evidence that the Government is presenting no substantial question as to the meaning of the consent judgment.

* It will be noted that when the Government's "simple illustration" is applied to Arapahoe—as it was unquestionably intended to be applied—it assumes that a line representing 20 million dollars invested capital in 1954 had a valuation of 40 million dollars four years later. This doubling of value has no reasonable relation to economic inflation, nor can it be explained by reinvested earnings, since the value of facilities acquired through the investment of earnings in excess of 7% is not included in valuation for purposes of the consent judgment. The only possible explanation for the doubling of value is to make the horrible example still more horrible.

ARGUMENT.

1. The Clear Language of the Consent Judgment Leaves No Question as to Its Meaning.

The court below was clearly correct in finding the consent judgment to be plain upon its face. Even a cursory reading leaves no doubt as to its meaning.

Paragraph III of the judgment (*infra*, page 41) reads as follows:

> "No defendant common carrier shall * * * pay * * * to any shipper-owner in any calendar year * * * any * * * dividends; * * * in excess of its share of seven percentum (7%) of the valuation of such common carrier's property * * * but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to * * * pay said percentum."

Valuation is then defined as meaning the latest final valuation as made by the I. C. C.

This direction is unequivocal. It simply imposes a dividend limitation upon common carriers whose rates and practices are already regulated by the I. C. C. Without such restriction, any carrier could pay any stockholder, whether or not a shipper, its proportionate share of any dividend which might be declared. Paragraph III puts a ceiling on the amount that can be paid to a shipper-owner—the limit being the share of 7% of I. C. C. valuation proportionate to its stock holding.

Notwithstanding the plain direction of Paragraph III, the Government contends that the consent judgment requires Arapahoe, in computing permissible dividends, to make an adjustment on account of debt. Below, the Government contended that the adjustment should take the form of a deduction from valuation. On appeal, it seeks to compute permissible dividends at 7% of total valuation and then to adjust this figure by multiplying it by the ratio between the shipper-owner's "investment" and "total invested capital."

The Government points to no explicit requirement in the consent judgment either for a deduction from valuation or for multiplying permissible dividends by any ratio between investment and invested capital, and it points to no provisions which would support an implied requirement. In fact, a reading of the consent judgment as a whole compels the conclusion that no such adjustment is to be made. For example:

The valuation to be used in computing permissible dividends is the I. C. C. valuation of the carrier's property. When adjustments to this valuation are to be made for purposes of the consent judgment, they are explicitly provided for. Paragraphs III(a) and III(b) provide that facilities acquired through investment of earnings in excess of the 7% limitation shall not be included in valuation for purposes of the judgment, although such facilities would be included in I. C. C. valuation. Provision is also made for the inclusion of additions and betterments and for the deduction of depreciation and retirements. Against this background, the absence of a provision for deducting the portion of valuation attributable to a loan is overwhelming evidence that no such deduction was intended.

There are no provisions in the consent judgment as to computation of a shipper-owner's "investment," and the phrase "invested capital" does not appear at all. Yet these are crucial elements of the Government's new ratio.

Furthermore, the draftsmen of the judgment were fully cognizant that carrier debts existed at that time; Paragraph V specifically permits the use of excess earnings to retire them. If the parties had intended any adjustment on account of debt, they would have said so.

Finally, the reporting provisions of Paragraph VIII require the carriers to report each year to the

Attorney General, *inter alia,* the valuation used as earnings basis, the earnings available for distribution and the amount of dividends actually paid. There is no requirement for reporting outstanding indebtedness, invested capital, or the value of shipper-owners' investments. All these items would be essential if the adjustments proposed by the Government were to be made, and would have been insisted on by the Government if such adjustments had been intended when the consent judgment was negotiated.

In fact, the Government points to no provisions of the consent judgment that support its new reading in any way. It argues purely and simply that "share" was intended to refer to shares "as between stockholders and creditors." To state this position is to refute it. No lawyer would speak of a creditor as having a "share" in earnings or dividends. And none would rely on the word "share" to convey the formula the Government reads into it. One has only to picture the intricacies of utility debt and equity financing, and to imagine the complex changes as the carrier's securities are bought and sold by shippers and non-shippers and as the carrier itself invests in carrier and non-carrier properties, to reject the notion that all this was to be conjured up and definitively settled by the word "share."

The true reason for using the words "its share of" as a prefix to the phrase "7% of valuation" is simply that the complaint in this case was not limited to *alter ego* situations where a single shipper-owner controlled a pipeline. It included as defendants oil companies shipping over lines in which they had only a minority stock interest. This made it possible for two or more defendants to be shipper-owners in respect of the same line,* which in turn made it necessary for the consent judgment to recognize

* There were in fact ten instances in which a defendant carrier had multiple shipper-owners.

that their shares in the 7% limitation would be proportional to their stock holdings. Absent the phrase "its share of," a carrier with multiple shipper-owners would have been permitted to pay a dividend of 7% of I. C. C. valuation to each of them.

There is no need for further argument. The consent judgment is, indeed, clear upon its face. The District Court so found. The Government does not seriously question that finding.

2. For Sixteen Years the Defendants and the Department of Justice Uniformly Interpreted the Consent Judgment as Does Arapahoe, and the District Court has also so Interpreted it.

There is no dispute that, during the sixteen years between the entry of the consent judgment and the filing of the motion against Arapahoe, the defendants and the Department of Justice interpreted the consent judgment as not requiring any reduction in permissible dividends where the carrier has outstanding indebtedness. The lower court so found, and the jurisdictional statement does not take issue with this finding. This practical construction by the parties over the sixteen-year period forecloses any argument now as to the meaning of the judgment.

As stated heretofore, the annual compliance reports filed with the Attorney General pursuant to Paragraph VIII of the consent judgment consistently interpreted the judgment as permitting dividends to shipper-owners equal to 7% of I. C. C. valuation without any adjustment for debt. The Government's jurisdictional statement shows that these compliance reports were subjected to extensive study by the Department of Justice. It says that during the period 1942 to 1957 the Department repeatedly had under examination questions of non-compliance with various provisions of the judgment; that three F.B.I. investigations were conducted; and that 31 official interpretations were issued. It does not and cannot claim, however, that

any of these official interpretations included either the construction urged on the court below, or the construction which the Government now urges on this Court. The reason is obvious: the Department agreed with the industry interpretation.

Nor can the Government claim that its acquiescence in the defendants' interpretation was made without full awareness that the carriers had outstanding indebtedness. Every valuation report issued by the I. C. C. (containing, *inter alia*, a detailed description of the nature and extent of the indebtedness of the carrier concerned) is required by Section 19a(h) of the Interstate Commerce Act (*infra*, page 39) to be sent to the Attorney General prior to becoming final. These valuation reports have been carefully studied by the Attorney General and compared with the compliance reports filed by the carriers pursuant to Paragraph VIII of the consent judgment. Moreover, the indebtedness is reported by the carriers in the statistical reports, Form P, which are filed with the I. C. C. and summarized in an annual compilation which the I. C. C. publishes and widely distributes. The latter documents are made available to, and have been studied by, the Attorney General.

In addition to acquiescing all these years in the compliance reports filed by the carriers, the Attorney General repeatedly and affirmatively showed his concurrence in the interpretation placed on the consent judgment by the defendants. Many instances were set forth in the record below. They amply support the holding of the District Court that the decree has been interpreted uniformly by all parties. The following are three examples:

(*a*) On February 22, 1944, the Honorable Francis Biddle, then Attorney General, explained the judgment to Senator Gillette, stating, *inter alia*, that "the defendant oil company may receive profits from its

own pipelines to the extent of 7 per cent of valuation." This statement that the carriers are permitted to pay the full 7% of valuation, made with full knowledge of the debts then outstanding, is the clearest possible example of the position taken by the Department of Justice through the years. It is difficult to understand how the present administration can find a substantial question of interpretation in a judgment which the Attorney General who signed it could reduce to such simple terms.

(*b*) In 1951 Standard Oil Company (New Jersey), a shipper-owner under the consent judgment, wrote the Attorney General asking for an official interpretation of the judgment with respect to the question whether for 1948 and subsequent years the carriers should use I. C. C. valuations as of December 31, 1947 rather than the valuations in effect when the consent judgment was entered; and whether dividends "not in excess of 7%" of the 1947 valuations would be "proper" under the judgment. The Attorney General replied that 1947 valuations should be used until the I. C. C. issued later ones. Standard then wrote the Attorney General that it would not accept dividends from its subsidiary pipeline companies "in amounts greater than those calculated in accordance with the interpretation set forth in our correspondence." At the suggestion of the Attorney General, it notified its subsidiaries, both carriers and shipper-owners, to be guided accordingly. At the time, many of Standard's subsidiary pipeline companies had outstanding third party debt which was well known to the Attorney General. Thereafter, in reliance upon the Attorney General's official interpretation, the carriers continued as before, without objection by the Attorney General, to compute the amounts available for distribution to their shipper-owners at 7% of I. C. C. valuation without any adjustment on account of the debt.

(*c*) The Department of Justice, as late as 1955, wrote to Sinclair Pipe Line Company questioning the use by that company of a valuation base other than its latest I. C. C. final valuation. The question arose because (unknown to the Attorney General) Sinclair Pipe Line Company had not received its final I. C. C. valuation as of the date when its report had been filed. Ironically, although the Attorney General knew that Sinclair Pipe Line Company had outstanding debt at that time, and although it had made no adjustment to reflect such debt in its report, the Attorney General insisted in his correspondence that Sinclair Pipe Line Company use a higher valuation base than the one which it had reported.

A noteworthy occasion on which the Government might have been expected to advance its present interpretation—but did not—is the supplemental order of 1942 on the Great Lakes Pipe Line Company petition, to which both Pure and Sinclair were parties. This supplemental order was consented to by the Honorable Thurman Arnold, the same Assistant Attorney General who participated in drafting the original judgment and signed that judgment. It was entered in the same court that entered the original judgment. The circumstances were such as to require all parties to consider carefully the interplay of debt, dividends and segregated earnings under the consent judgment. The provisions of the supplemental decree confirm the interpretation given the original judgment by the defendants and the interpretation heretofore given it by the Department of Justice. The supplemental decree is wholly inconsistent with the Department's position here.

The Government purports to base its appeal on the meaning of the words of the consent judgment. The controlling significance of the foregoing facts thus becomes

apparent, for in the case of consent judgments, no less than in the case of contracts, the practical construction placed upon the language by the parties thereto is the best and most compelling evidence of its meaning.

In the case at bar, the canon of practical construction is given added weight by reason of Paragraph VIII of the judgment. This is not the usual compliance provision found in antitrust consent decrees. It imposes an annual duty upon the carriers to report the information from which the Attorney General can determine (pursuant to his statutory duty to enforce consent judgments) whether they are adhering to or violating the judgment. The rulings and letters evidencing the Attorney General's interpretation of the judgment were issued in performance of this statutory duty. They constitute contemporaneous and subsequent practical construction of the judgment by the agency charged with administering and enforcing it, and accordingly they are entitled to great weight.

This principle was succinctly stated by Mr. Justice Roberts in *United States* v. *Chicago North Shore & Milwaukee Railroad Co.,* 288 U. S. 1 (1933), where the Attorney General, upon motion of the Interstate Commerce Commission, sought to enjoin the defendant railroad from issuing certain securities without prior approval from the Commission in accordance with Section 20a of the Interstate Commerce Act. The railroad contended that it fell within the exemption provided in that section for electric railways. It relied upon a prior ruling of the Commission that it was exempt from another provision of the Act on the same ground, and also upon the Commission's acquiescence in earlier security issues, all of which had been reported to the Commission in reports similar to the Form P Reports filed by pipelines. The Supreme Court held that the railroad was exempt from the provisions of Section 20a, Mr. Justice Roberts stating at pages 13-14:

"With this knowledge of the situation the Commission never, until it requested the Attorney General to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of § 20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons * * *.

"The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under § 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation."

Additional weight must be attached to the interpretation given the judgment by the Attorney General because he actively participated in drafting it. *United States* v. *Zucca*, 351 U. S. 91 (1956).

The Government has given the Court no reason whatever for expanding the judgment beyond the meaning ascribed to it by the Attorney General and all other interested parties for more than sixteen years. For this reason alone, the order of the District Court should be affirmed without further argument.

3. The Government is Bound by Its Agreement—It Cannot Rewrite the Consent Judgment.

Despite token references to interpreting the language of the consent judgment, it was apparent below and is apparent here that the Government is actually seeking as a sixteen-year afterthought to rewrite the judgment. This extreme position was succinctly set forth in its brief below (page 28), where it stated, "even if the Government were to join with the defendants in urging the defendants' construction, the Court could not accept it * * *."

The court below held that it had no right to change the consent judgment. It said:

> "* * * this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties after due deliberation and approved by the Court in 1941 and again in 1942 by the supplemental order."

The Government's jurisdictional statement challenges this holding by indirection. It says that if the consent judgment as uniformly interpreted permits dividends in excess of 7% on investment, the judgment is ineffective in accomplishing the objective of the original suit.* The inference sought to be drawn is that under such circumstances the Court can and should rewrite the decree.

The simple fact is that the Government, like the defendants, is bound by its agreement and cannot ask that it be rewritten because after sixteen years of hindsight the Government now believes that a different agreement would have been preferable. The jurisdictional statement suggests that because the motion is concerned only with

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* The defendants, of course, would not concede that the consent judgment is ineffective. In the proceedings below they frequently characterized the consent judgment as a "hard" decree and stated that the industry felt "put upon."

prospective operation of the consent judgment, "acquiescence, laches or failure to act" do not bar the Government from proceeding "to enforce public rights." In point of fact, the Government is not now proceeding to enforce rights which it has negligently delayed in enforcing; it is trying to repudiate an express agreement in which it actively concurred over a period of sixteen years. Quite apart from the doctrine of laches, the sixteen years of uniform construction are urged by the defendants to show that the meaning of the consent judgment is and always has been clear beyond any question.

Afterthought attempts to rewrite consent judgments have been uniformly rejected by the courts. As Circuit Judge Maris said in *United States* v. *Radio Corporation of America*, 46 F. Supp. 654, 656 (D. Del. 1942):

> "It has been held that such a decree in an anti-trust case binds the Government as well as the defendants (United States *v.* International Harvester Co., 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302), even though it later appears that it was inadequate when entered, for the agreement upon which it is based is within the power of the Attorney General to make and his authority to determine what relief will satisfy the requirements of the law 'includes the power to make erroneous decisions as well as correct ones'. Swift & Co. *v.* United States, 276 U. S. 311, 331, 332, 48 S. Ct. 311, 317, 72 L. Ed. 587. In the present case the Attorney General determined that certain relief short of that prayed for would satisfy the public interest and he agreed to the entry of decrees terminating the suit by granting that relief. Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government the defendants are entitled to set them up as a bar to any attempt by the Government to

relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. Aluminum Co. *v.* United States, 302 U. S. 230, 232, 58 S. Ct. 178, 82 L. Ed. 219; United States *v.* International Harvester Co., 274 U. S. 693, 703, 47 S. Ct. 748, 71 L. Ed. 1302. This is a very real benefit of which they would be deprived were the Government's motion to be granted."

The argument that a consent decree must be given a distorted construction to effectuate its asserted purpose was rejected by this Court in *Hughes* v. *United States*, 342 U. S. 353 (1952). Mr. Justice Black, speaking for a unanimous court, said (at page 356-7):

"Arguing on a broader front than the mere language of section V, the Government urges: that section V must be interpreted so as to achieve the purposes of the entire R.K.O. consent decree; that the basic purpose of that decree was divorcement of production-distribution companies from theater exhibition companies; and that Hughes cannot consistently with this purpose be left with a 24% interest in both types of companies. It may be true as the Government now contends that Hughes' large block of ownership in both types of companies endangers the independence of each. Evidence might show that a sale by Hughes is indispensable if competition is to be preserved. However, in section V the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V."

The foregoing decisions foreclose any attempt by the Government to rewrite the judgment at this late date.

The jurisdictional statement (page 18) says that in signing the consent judgment the defendants may be viewed as having "tacitly recognized that returns of greater than 7% on investment would give them an unfair preference over other shippers, and therefore were to be prohibited as rebates." We would not want to leave the impression with the Court that the defendants made any such concession or that the consent judgment is to be construed in the light of the Government's rebate theory. As appears on the face of the judgment, it was a settlement of "money claims" made "without admission by any party in respect of any . . . issue."

In fact, no court has ever held that a legal dividend was a rebate under the Elkins Act.* The oil industry has always viewed the Government's rebate theory as a legal fantasy which any court would reject if the issue came to trial. The District Court in its opinion below stated that, if it were required to examine the question, it would not hold that the decree as interpreted by the defendants violates the Elkins Act.

Far from supporting the Government's rebate theory, the decisions of the Commission and the courts are against it. The I. C. C. has recognized that only the oil companies who intend to use pipelines have the economic incentive to build them. This Court has consistently held that the "commodities clause" of the Interstate Commerce Act, which prohibits a railroad from transporting products in which it has an interest, is not a bar to stock ownership of railroads by shippers. *United States* v. *Elgin J. & E.*

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* *United States* v. *Union Stock Yard*, 226 U. S. 286 (1912), cited at page 18 of the jurisdictional statement, does not so hold.

Railway Co., 298 U. S. 492 (1936). *A fortiorari*, an oil company may own the stock of a pipeline company, to which the commodities clause does not apply.

Since there is no legal impediment to stock ownership by an oil company in a pipeline, it necessarily follows that the shipper is entitled to receive dividends upon its stock. The I. C. C. has consistently held that if the carrier's rates are fair and reasonable, it is immaterial that a part of the tariffs paid by other shippers may "inure to the benefit" of a shipper-stockholder: *e. g.*, *Adriatic Mining Company* v. *Chicago & North Western Railway Company*, 78 I. C. C. 611 (1923).

The amount of dividends paid by any carrier is determined ultimately by the rates it charges. The I. C. C. has complete jurisdiction over pipeline rates and practices, including rebates. Moreover, the Commission had exercised its jurisdiction prior to entry of the judgment in two exhaustive proceedings establishing rates and practices for crude oil and products lines. Its orders were entered with full knowledge of the dividends received by shipper-owners. The Honorable Owen Clarke, then Chairman of the Commission, recently testified before a Congressional Committee that since the Commission's 1948 decision "no one has suggested to the Interstate Commerce Commission that pipeline rates are too high."* It is difficult to see a substantial question of public interest in an area alleged to involve "unfair preferences" when the persons

* Hearings before the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives, 85th Cong. 1st Sess., 484 (1957). Mr. Clarke said (p. 456) that there had only been about six cases in respect of pipeline rates in approximately 35 years, and this would include those initiated by the I. C. C. Later (p. 484) he added: "The independent shippers have complained to us that railroad rates, motor carriers, barge rates were too high, and we have had rate cases involving them, but not involving pipelines, because presumably everyone is satisfied."

alleged to have been discriminated against do not complain.

This proceeding does not involve an interpretation of the original complaint or the Elkins Act. It involves only the meaning of the consent judgment. The defendants recognize that, having compromised their original case in 1941, they are bound by their agreement. All they ask is that the Government be similarly bound by the plain words of the agreement as uniformly interpreted for sixteen years.

CONCLUSION

The lower court has found that the provisions of the consent judgment are clear, and are confirmed by sixteen years of uniform construction. The jurisdictional statement does not take serious issue with these findings. Any effort by the Government to rewrite the judgment is foreclosed by decisions of this Court. Accordingly, it is submitted that there are no substantial issues needing further argument and that the order of the District Court should be affirmed.

The Court also has under consideration the Motion to Dismiss or Affirm filed by Interstate and Tuscarora. Arapahoe hereby adopts and joins in that motion and submits that if the Motion to Dismiss is granted, leaving the construction of the consent judgment embodied in the last three parts of the District Court's order not appealed from and hence final, there will be no substantial question but that the first part of the District Court's order has correctly applied that construction to Arapahoe and

that therefore the order, insofar as it relates to Arapahoe, must be affirmed.

Respectfully submitted,

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1210 Shoreham Building,
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Counsel for Arapahoe Pipe Line Company.

The Pure Oil Company and Sinclair Pipe Line Company (successor to defendant Sinclair Refining Company)—by reason of the fact that they are owners of all the capital stock of Arapahoe, are shipper-owners under the consent judgment, and will be directly affected by the outcome of these proceedings—urge the Court to grant the foregoing motion.

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NAT. J. HARBEN,
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New York, N. Y.
DUDLEY C. PHILLIPS,
Sinclair Pipe Line Company,
Independence, Kansas.
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35 E. Wacker Drive,
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Counsel for The Pure Oil Company.

Dated: AUGUST 22, 1958.

APPENDIX A.

OPINION OF THE COURT BELOW.

(Pages 134-5 of the Transcript of the Hearing held March 24, 1958)

THE COURT:—Does anybody else want to say something?

I have heard all of you gentlemen fully, and I must say that none of you has abused the privilege accorded you. I should say also that each of you has been helpful to the Court in presenting it with briefs setting forth your respective positions and attempting to show justification for the positions taken.

I have, by virtue of the time heretofore afforded me and the fact that these various memoranda were not dumped on me simultaneously, been able to keep abreast of you through those documents.

I reach the conclusion, fortified by the arguments of today, that this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties after due deliberation and approved by the Court in 1941 and again in 1942 by the supplemental order.

I do not treat the proceedings before me as asking for abandonment of the decree *in toto*. Actually, if I were required to act upon such a request, I would not hold that the decree as it has been interpreted by the parties over a period of sixteen years violates the Elkins Act. There has been no adjudication of the violations alleged in the

original complaint herein. The consent decree was the vehicle by which the two sides attempted to ride out a situation where issues had been joined but never determined.

I have stated to you that I find no ambiguity in the terminology of the decree. I think it is clear upon its face; but even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years.

I have before me at the present time, I believe, three motions dealing with this aspect of the case. I think—with due respect to Judge Peck—there is a fourth one, which is in his motion. The other motion, I believe the record has been cleared of. That was the rule to show cause.

As to these three motions of the Government, I will deny them. From that action by the Court, it follows that I hold that the interpretation of the decree which Judge Peck requested in the Interstate and Tuscarora motion is the correct interpretation.

Unless there is something further from either side, I will take an order to that effect.

APPENDIX B.

ORDER OF THE COURT BELOW.

Plaintiff having moved on October 11, 1957, for an order directing Arapahoe Pipe Line Company to carry out the judgment herein entered December 23, 1941, and the Court having entered an Order herein March 10, 1958 directing plaintiff to serve its motion upon all defendants in this action, and defendants Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, having filed on February 5, 1958, their petition for "Order to Confirm Rights Under the Judgment of December 23, 1941", both the motion and the petition presenting the same question of construction of the judgment of December 23, 1941; Now

~~Upon the final~~ judgment entered on consent December 23, 1941, the order entered on consent on August 3, 1942, on the petition of Great Lakes Pipe Company, the motion of plaintiff entitled "Motion for Order for Carrying Out Final Judgment" against Arapahoe Pipe Line Company filed October 11, 1957, the verified response of Arapahoe Pipe Line Company filed January 20, 1958, the verified statement of additive facts and prayer for relief of the defendants Magnolia Pipe Line Company, The Texas Pipe Line Company, Plantation Pipe Line Company, Shell Pipe Line Corporation, Sinclair Pipe Line Company, Service Pipe Line Company, Great Lakes Pipe Line Company, Cities Service Pipe Line Company, Texaco-Cities Service Pipe Line Company, Texas-New Mexico Pipe Line Company, Continental Pipe Line Company and Humble Pipe Line Company filed February 12 and 13, 1958, pursuant to the stipulation of January 30, 1958 approved and so ordered by the Court, the petition of Interstate Oil Pipe

Line Company and Tuscarora Pipe Line Company, Limited, for an "Order to Confirm Rights Under the Judgment of December 23, 1941" filed February 5, 1958, and the answer of plaintiff to said petition dated February 21, 1958; And

After hearing counsel for all parties herein desiring to be heard upon the foregoing record, and there being no disputed questions of fact, and the Court upon due consideration having rendered its opinion at the conclusion of the hearing on March 24, 1958, it is this 25th day of March, 1958

Ordered that plaintiff's motion for an "Order for Carrying Out Final Judgment" against Arapahoe Pipe Line Company be and the same hereby is in all respects denied; and it is further

Ordered that the prayer for relief contained in the Statement Pursuant to Stipulation of January 30, 1958 and the petition of defendants Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, be and the same hereby are granted; and it is further

Ordered that the valuation of common carrier's property on which the shipper-owner's permissible dividends may be computed is the valuation of the carrier's property as provided in the judgment entered December 23, 1941 without deducting the amount of any indebtedness from such valuation; and it is further

Ordered that defendant common carriers are permitted to pay dividends to their respective shipper-owners on the basis of such computation.

/s/ R. B. Keach,
Judge.

APPENDIX C.

Pertinent Provisions of the Interstate Commerce Act 49 U. S. C. 1, *et seq.*

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§ 1. *Regulation in general; car service; alteration of line —Carriers subject to regulation*

(1) The provisions of this chapter shall apply to common carriers engaged in—

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States.

§ 1(3)(a). *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; * * *

§ 1(4). *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *

§ 1(5). *Just and reasonable charges.* All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

§ 2. *Special rates and rebates prohibited.*

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

§ 3. *Preferences; interchange of traffic; terminal facilities —Undue preferences or prejudices prohibited.*

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

§ 6. *Schedules and statements of rates, etc., joint rail and water transportation.*—(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * *

§ 6(7). *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

§ 19a. *Valuation of property of carriers*
Physical valuation of property of carriers; classification and inventory

(a) The Commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject

to the provisions of this chapter, except any street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation; but the Commission may in its discretion investigate, ascertain, and report the value of the property owned or used by any such electric railway subject to the provisions of this chapter whenever in its judgment such action is desirable in the public interest. To enable the Commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The Commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The Commission shall, subject to the exception hereinbefore provided for in the case of electric railways, make an inventory which shall list the property of every common carrier subject to the provisions of this chapter in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

Cost of property; elements considered in determination; gifts, grants, etc.

(b) First. In such investigation said commission shall ascertain and report in detail as to each piece of property, other than land owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences

between any such value and each of the foregoing cost values.

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same.

Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

Fifth. The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations,

or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the persent time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

Investigation; procedure and forms.

(e) Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

Valuation of extensions and improvements; revisions; reports

(f) Upon completion of the original valuations herein provided for, the Commission shall thereafter keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of all common carriers as to which original valuations have been made, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and

may keep itself informed of current changes in costs and values of railroad properties, in order that it may have available at all times the information deemed by it to be necessary to enable it to revise and correct its previous inventories, classifications, and values of the properties; and when deemed necessary, may revise, correct, and supplement any of its inventories and valuations.

Reports and information to be furnished by carriers

(g) To enable the Commission to carry out the provisions of paragraph (f) of this section, every common carrier subject to the provisions of this chapter shall make such reports and furnish such information as the Commission may require.

Notice of completion of tentative valuation; protests; finality of report

(h) Whenever the commisison shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

APPENDIX D.

Operative Provisions of Consent Judgment in United States of America *v.* The Atlantic Refining Company, *et al.*, entered December 23, 1941.

The plaintiff, United States of America, having filed its complaint herein on December 23, 1941; all the defendants having appeared generally and severally filed their answers to such complaint denying the substantive allegations thereof; all parties hereto by their respective attorneys herein having severally consented to the entry of this final judgment herein without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue and in final settlement of all claims herein in issue;

Wherefore It Is Ordered, Adjudged and Decreed in compromise and in final settlement of all money claims herein in issue, including claims for penalties, damages and forfeitures, as follows:

I. That the Court has jurisdiction of this cause of action, of the subject matter hereof and of all the parties hereto.

II. For the purposes of this judgment when hereinafter used:

"Defendant common carrier" shall mean and include each and every common carrier engaged in the business of transporting crude oil or gasoline or other petroleum products in interstate commerce by pipeline which is or may be (a) a defendant, or (b) the successor of a defendant, or (c) the subsidiary of a defendant, or (d) a pipeline department of one or more defendants, or (e) a corporation, some or all of whose stock is owned by a de-

fendant, or the successor or subsidiary of a defendant, or (f) owned or operated in such a manner that a defendant, its successor or subsidiary shall be entitled to participate in its net earnings.

"Shipper-owner" shall mean and include each defendant and its affiliates where such defendant or any of its affiliates ships crude oil or gasoline or other petroleum products by pipeline of any defendant common carrier and either the defendant or any one of its affiliates is entitled to participate in the net earnings of the defendant common carrier.

"Affiliates" shall mean and include successors and subsidiaries of any defendant, the ~~parent~~ of any defendant, and the subsidiaries of any such parent, and such other persons, groups or corporations so related as to in effect control or to be controlled by any defendant.

"Petroleum products" shall not mean or include natural gas.

III. No defendant common carrier shall credit, give, grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum.

(a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commis-

sion. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission. Such valuation shall not include the value of the common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account as provided in paragraph V hereof.

(b) In event the Interstate Commerce Commission has not determined the final valuation of the property owned and used for common carrier purposes by any common carrier, and until such time as the Interstate Commerce Commission has determined the final valuation of such common carrier's property, the valuation shall be determined by the common carrier and shall be based upon the records and accounts of the carrier kept in accordance with the accounting methods set forth in the Uniform System of Accounts for Pipe Lines prescribed by the Interstate Commerce Commission. To this determination of valuation by the common carrier shall be added the value of additions and betterments to the common carrier property made after the date of such determination, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed as of the close of the next preceding year, in accordance with the Uniform System of Accounts for Pipe Lines prescribed by the In-

terstate Commerce Commission. Such determination of valuation shall not include the value of the common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account, as provided in paragraph V hereof.

(c) Any amounts permitted to be credited, granted, paid or given during any calendar year as hereinabove provided, if earned and withheld, may be credited, granted, paid or given at any time thereafter in addition to credits and payments permitted during such subsequent years, unless (i) such earned and withheld sums shall have been invested in common carrier facilities and (ii) included in valuation as above defined.

(d) Any amounts permitted to be credited, granted, paid or given during any calendar year as hereinbefore provided, if not earned, may be credited, granted, paid or given within any one or more of the next succeeding three years, in addition to credits and payments permitted during each such subsequent year.

IV. No shipper-owner shall solicit, accept or receive, directly or indirectly, through or by any means or device whatsoever, from any defendant common carrier any sums of money or other valuable considerations which said defendant common carrier is prohibited from granting, crediting, paying, or giving by the provisions of paragraph III hereof.

V. Commencing January 1, 1942 each defendant common carrier shall retain (except as hereinafter provided) net earnings derived from transportation or other common carrier services in excess of the amounts permitted to be credited, granted, paid or given by paragraph III hereof and transfer such excess earnings to the surplus account

within 90 days after the end of each calendar year. The said excess earnings shall be transferred to the surplus account as a separate item therein and in such a form as to be readily identifiable. The excess earnings thus transferred to the surplus account may be used by the defendant common carrier for extending existing or constructing or acquiring new common carrier facilities, for maintaining normal and reasonable working capital requirements during the current calendar year, and for retiring of any debt outstanding at the time of the entry of this judgment and decree, provided, however, that such debt or refunded debt was originally incurred for the purpose of, and the proceeds thereof expended in, constructing or acquiring common carrier property. In case of the dissolution, sale, transfer or divorcement of any defendant common carrier, any retained portion of the surplus account may be disbursed to stockholders of the corporation which owns and controls the defendant common carrier at that time.

VI. In the event a shipper-owner or defendant common carrier should knowingly violate the provisions of paragraphs III or IV hereof, then and in such event, upon proof of such violation on hearing after notice, and in lieu of any and all other remedies or proceedings for the enforcement hereof, the United States may have judgment entered in this cause against the recipient of any sums, the payment of which is prohibited by this judgment, for three times the amount by which the sum received exceeds the amount permitted by this judgment to be granted, credited, given or paid to such recipient.

VII. This judgment shall not in any manner (1) limit or qualify in any way the right of any party to introduce in the case of *United States of America v. American Petroleum Institute, et al.*, now pending in the District Court for the District of Columbia, or in any other proceeding, civil or criminal, brought under the antitrust

laws, competent evidence otherwise admissible relating to the construction, operation, maintenance, use or distribution of pipelines or other means of transportation owned, operated, or controlled by the defendants herein, or with respect to the investment in, valuation of, benefits derived from ownership of or interest in, or rate of return upon, said pipelines or other methods of transportation, or (2) limit, restrict, enlarge or control in any way the right of the United States in the case of *United States of America v. American Petroleum Institute, et al.*, or in any other proceeding brought under the antitrust laws to obtain from the Court such relief, including sale, divorcement, or any other kind of rearrangement with respect to pipelines or any other means of transportation now or hereafter owned, operated or controlled by the defendants herein, as the Court deems proper.

VIII. Each defendant common carrier shall render a report to the Attorney General of the United States not later than the 15th day of April of each year, showing for the preceding calendar year; the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof.

IX. This judgment shall not be construed to restrict, limit, or enlarge any right, privilege or exemption granted to any pipeline corporation or its stockholders (a) by the provisions of the Act of Congress approved July 30, 1941, entitled "An Act to Facilitate the Construction, Extension, or Completion of Interstate Petroleum Pipe Lines related to National Defense", or (b) by the terms of any proclamation of the President of the United States issued pursuant to said Act of July 30, 1941.

X. The jurisdiction of this case is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this judgment, for the modification hereof upon any ground, and for the enforcement of compliance herewith in the manner set forth above. No future modification hereof shall impose any liability upon any defendant for any act or conduct performed prior to the date of such modification, in excess of the liability imposed by paragraph VI hereof.

This 23rd day of December, 1941.

DAVID A. PINE, *Justice.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA,
Appellant,

v.

THE ATLANTIC REFINING COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF INTERSTATE OIL PIPE LINE COMPANY AND TUSCARORA PIPE LINE COMPANY, LIMITED TO DISMISS THE APPEAL FROM, OR AFFIRM, THE ORDER OF MARCH 25, 1958

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August 22, 1958

INDEX

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Appellees Interstate Oil Pipe Line Company ("Interstate") and Tuscarora Pipe Line Company, Limited ("Tuscarora"), referring solely to the appeal from the "Order of March 25, 1958, denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipeline Company", move pursuant to Rule 16 of the Revised Rules of this Court:

(1) to dismiss the appeal insofar as it purports to be an appeal with respect to Interstate and Tuscarora on the ground that no appeal has been taken from the parts of the Order of March 25, 1958 which determine the rights of these defendants; or, in the alternative,

(2) to affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

OPINION BELOW

The District Court did not write a formal opinion, but explained on the record the basis for its decision (Juridictional Statement, Appendix A, pp. 27-8).

A copy of the District Court's Order of March 25, 1958 is set forth in Appendix A, *infra*, pp. 19-20.[1]

JURISDICTION

The action was originally brought under Section 3 of the Elkins Act, 49 U. S. C. § 43. A final judgment was entered on consent on December 23, 1941.

The District Court's order with which this motion is concerned was entered on March 25, 1958 at the foot of the 1941 judgment; the notice of appeal, which covered only a part of that order, was filed in that Court on May 24, 1958. A copy of the notice of appeal is set forth in Appendix B, *infra*, pp. 21-3.

The jurisdiction of this Court to review the order on direct appeal is invoked by appellant under Section 2 of the Expediting Act of 1903, 32 Stat. 823, 15 U. S. C. § 29, 49 U. S. C. § 45, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTES INVOLVED

Relevant portions of the Interstate Commerce Act and the Elkins Act are set forth in the Jurisdictional Statement, Appendix B, pp. 31-5.

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[1]A copy of the Order of March 25, 1958 is not appended to the Jurisdictional Statement.

Appellant's Jurisdictional Statement (p. 2) incorrectly describes the orders of the District Court as having been entered on "March 24 and March 25, 1958". One order was entered on March 25, 1958, the appeal from which is the subject of this motion. Two other orders, in the so-called "Tidal" and "Service" proceedings, were entered on March 26, 1958, the appeals from which are not the subject of this motion; the two orders of March 26, 1958 are not directed against and have no application to Interstate and Tuscarora; copies of these two orders are not appended to the Jurisdictional Statement.

QUESTIONS PRESENTED

Paragraph III of the judgment of December 23, 1941 limits the amount of dividends that a petroleum pipe line ("common carrier") may pay in any year to an oil company which ships over the line and is at the same time a stockholder or owner ("shipper-owner") to

> "its [the shipper-owner's] share of seven percentum (7%) of the valuation of such common carrier's property".

Paragraph III also provides that the carrier "shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum".

"Valuation" is defined in subparagraph III(a) as the "latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission".

The Government's motion of October 11, 1957 addressed to Arapahoe Pipe Line Company ("Arapahoe"), a petition of Interstate and Tuscarora of February 5, 1958 consolidated for hearing therewith, and the Order of March 25, 1958 all concern the meaning of the above quoted clause of paragraph III, "its share of seven percentum (7%) of the valuation of such common carrier's property".

The Order of March 25, 1958 contains four separate ordering paragraphs which, respectively, (a) denied the Government's motion praying relief against Arapahoe; (b) granted the petition of Interstate and Tuscarora on the construction of the above quoted clause of paragraph III and the computation and payment of dividends thereunder, and the related prayer for relief in a separate statement filed by 12 other defendants; (c) decreed affirmatively that "the valuation of common carrier's property on which the

shipper-owner's permissible dividends may be computed is the valuation of the carrier's property as provided in the judgment entered December 23, 1941 without deducting the amount of any indebtedness from such valuation"; and (d) decreed affirmatively that "defendant common carriers are permitted to pay dividends to their respective shipper-owners on the basis of such computation".

The Government's appeal is only from the "Order of March 25, 1958, denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipeline Company."

The following questions are presented by this motion:

1. Whether, since the Government has not appealed from those separate parts of the order of March 25, 1958 in which the District Court granted the petition of Interstate and Tuscarora (and the related prayer for relief of 12 other defendants) and decreed the correct construction of the quoted portion of paragraph III and the rights thereunder, that construction is final so far as Interstate and Tuscarora, and every person subject to the judgment, are concerned, and the Government's appeal should therefore be dismissed insofar as it purports to be an appeal with respect to Interstate and Tuscarora.

2. Whether the appeal from that part of the Order of March 25, 1958 denying the motion against Arapahoe should be affirmed because the unappealed, and thus final, parts of the District Court's order (the construction paragraphs) determine the question raised by the appeal.

3. Whether, in any event there is no substantial question that, as found by the District Court and as consistently interpreted by the defendants and advertently accepted by the Department of Justice continuously for 16 years, the

clause "its share of seven percentum (7%) of the valuation of such common carrier's property" in paragraph III of the judgment of December 23, 1941 clearly and unambiguously means that the annual dividends permitted to be paid by a defendant common carrier to its shipper-owners are to be calculated on the basis of 7% of the *entire* valuation of the carrier's property (as defined in subparagraph III(a) of the judgment) and, if there are two or more shipper-owners, prorated among the shipper-owners in accordance with their capital stock interests.

STATEMENT

On December 23, 1941, the complaint of the United States and the answers of the 79 defendants were filed, and a final judgment consented to by the Government and the defendants was simultaneously entered by Judge Pine, in the District Court for the District of Columbia.

The complaint listed 27 oil companies as defendant shipper-owners and 52 petroleum pipe line companies as defendant common carriers. Ten of the common carriers were listed as having two or more shipper-owners.[2]

The complaint demanded injunctive relief and treble damages on the theory that, although the shipper-owners were paying the full applicable tariff rates filed with the Interstate Commerce Commission by the common carrier pipe lines, the payment of *any* dividends by the defendant

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[2] A "shipper-owner" is defined in paragraph II of the judgment as "each defendant and its affiliates where such defendant or any of its affiliates ships crude oil or gasoline or other petroleum products by pipe line of any defendant common carrier and either the defendant or any one of its affiliates is entitled to participate in the net earnings of the defendant common carrier". This includes, in addition to stockholders of pipe line corporations, owners of so-called "undivided interest pipelines". Whenever reference is made herein for convenience to "stockholders" or "stock", it is also intended to include such owners and their proprietary interests.

common carriers to the defendant shipper-owners amounted to "refunds, rebates, and offsets against regular tariff charges" in violation of Section 6(7) of the Interstate Commerce Act and Section 1 of the Elkins Act.

The answers of appellee Interstate's predecessor (Oklahoma Pipe Line Company) and of appellee Tuscarora (then known as Tuscarora Oil Company, Limited) and of their shipper-owners, as well as the answers of every other defendant in the action, denied the substantive paragraphs of the complaint.

The consent judgment was entered "without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue and in final settlement of all claims herein in issue".

At the time the judgment was entered, and since 1906, the Interstate Commerce Commission had (and still has) jurisdiction over the rates charged by petroleum pipe lines. At December 23, 1941 the I. C. C. had already determined that allowable rates for petroleum products pipe lines were to be calculated on a basis of producing an operating income sufficient to yield a return to the carrier of no more than 10% on valuation,[3] and had entered an order to show cause why an 8% return on valuation should not be fixed as reasonable for crude oil pipe lines.[4]

The Interstate Commerce Commission, however, has never attempted to regulate the resulting dividends to stockholders. There is no statutory authority for such regulation either by the I. C. C. or any other Governmental agency.

The consent judgment in this case did impose a carefully defined limit on dividends. To that end, paragraph III

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[3]*Petroleum Rail Shippers Association* v. *Alton & Southern Railroad, et al.*, 243 I. C. C. 589, 663-5 (March 11, 1941).

[4]*Reduced Pipe Line Rates and Gathering Charges*, 243 I. C. C. 115, 143-4 (1940). A final order was issued in 1948, 272 I. C. C. 375, 384; the I. C. C. found that the crude oil pipe line rates under consideration had continuously been reduced and had not been shown to be unlawful.

of the judgment limits the dividends which may be paid in any year to a shipper-owner by a petroleum pipe line to "its share of seven percentum (7%) of the valuation of such common carrier's property". "Valuation" is defined in subparagraph III(a) as "the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission". Paragraph III and its subparagraph (a), and other relevant paragraphs of the judgment, are set forth in Appendix C, *infra*, pp. 24-6.

In addition, paragraph VIII of the judgment requires each defendant common carrier to render a report to the Attorney General of the United States each year, showing "the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners. . . ."

For 16 years following the entry of the judgment the pipe line companies computed permissible dividends to their stockholders at 7% of the entire valuation as defined in subparagraph III(a) of the judgment. When earnings permitted such payments, they made payments to their stockholders within that maximum, prorating such payments when several stockholders were involved among the stockholders in accordance with their capital stock interests.

The companies have so reported, annually, to the Attorney General the valuation used, the permissible dividends and payments made.

On October 11, 1957, at a time when a Congressional committee was investigating the consent decree program of the Department of Justice, the Government instituted four separate proceedings, each against a single pipe line or against a single pipe line and its shipper-owner.

Three of the proceedings were motions entitled, with insignificant variations, "Motion for Order for Carrying

Out Final Judgment". These sought relief against, and were served only upon the following, respectively: (1) Arapahoe Pipe Line Company; (2) Service Pipe Line Company and Standard Oil Company (Indiana); and (3) Tidal Pipe Line Company and Tidewater Oil Company. The fourth proceeding, which was settled on consent, was (4) a petition for civil contempt addressed to and served only upon The Texas Pipe Line Company.[5]

The issues in proceedings (2), (3) and (4) do not arise with respect to appellees Interstate and Tuscarora. And those proceedings do not affect the issue involved in the Arapahoe proceeding.

However, appellees Interstate and Tuscarora, as well as the other parties to the judgment, were vitally affected by the motion addressed to, and served only upon, Arapahoe, because that motion, although cast in the form of a motion to "carry out" or "enforce" the judgment against Arapahoe, necessarily required the Court to *construe* the 7% of valuation clause in paragraph III in a manner different from the way the defendants had uniformly and consistently construed it for 16 years with full knowledge of the Department of Justice.

That motion sought an adjudication directing Arapahoe, "before computing the permissible dividends for its shipper-owners, to *deduct from the valuation* of its property owned and used for common carrier purposes *the share of such valuation* that is the result of or attributable to monies obtained by the carrier from third parties for extending existing or constructing or acquiring new common carrier facilities, . . ." [Italics supplied]

Appellees Interstate and Tuscarora therefore moved on February 5, 1958 to dismiss the Government's motion

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[5]Motions (1) and (2) involved interpretation of different provisions of the judgment of December 23, 1941; proceedings (3) and (4) presented the Court with a third question of interpretation.

addressed to Arapahoe on the ground that the requested construction had the purpose and would have the effect of adversely affecting them, coupled with the ground that the Government's procedure violated Rules 5, 65(d) and 71 of the Federal Rules of Civil Procedure by denying their rights to notice and hearing as parties. Earlier, on January 30, 1958, 12 other defendants had signed a stipulation with the Government defining their status in the action in a manner which Interstate and Tuscarora considered limiting and consequently declined to accept.[6]

Interstate and Tuscarora simultaneously filed a Petition for Order to Confirm Rights under the Judgment of December 23, 1941, in order to raise squarely the question of construction posed by the Arapahoe proceeding.[7]

This petition in substance prayed the Court to decree that the valuation on the basis of which permissible dividends to shipper-owners are to be computed under the 1941 judgment is the valuation of the entire carrier property as defined in the judgment, without deducting from the valuation any indebtedness, and that the defendant pipe lines are permitted by the judgment to pay dividends to their respective shipper-owners on such computation, prorating such payments when two or more owners were involved in accordance with their capital stock interests. The relief prayed by the petition is set forth in full in Appendix D, *infra*, p. 27.

At a hearing on March 10, 1958 the District Court, with the concurrence of counsel for Interstate and Tuscarora, disposed of the motion to dismiss the motion against Arapahoe by ordering the Government forthwith to serve its papers in the Arapahoe proceeding on all defendants.

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[6]On February 12 and 13, 1958, those 12 defendants also filed statements and prayed for affirmative relief.

[7]Copies of all papers filed in the District Court by Interstate and Tuscarora were served, pursuant to Rule 5 of the Federal Rules of Civil Procedure, on all parties to the judgment of December 23, 1941.

The Court's order of the same date consolidated for hearing on March 24, 1958 the motion against Arapahoe with the petition of Interstate and Tuscarora.

On March 24, after full briefs and argument, the Court ruled from the bench as to the 7% of valuation clause that

> ". . . this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties after due deliberation and approved by the Court in 1941 and again in 1942 by the supplemental order."[8]

The Court further held that

> ". . . it follows that the interpretation of the decree which Judge Peck [counsel for Interstate and Tuscarora] requested in the Interstate and Tuscarora motion is the correct interpretation."

After holding that there was no ambiguity with respect to the phrase "its share of seven percentum (7%) of the valuation of such common carrier's property", the Court also stated:

> "I have stated to you that I find no ambiguity in the terminology of the decree. I think it is clear upon its face; but even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years."[9]

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[8]The "supplemental order" referred to was an order of August 3, 1942 finding that a recapitalization plan of defendant Great Lakes Pipe Line Company was not in violation of the terms of the 1941 judgment, and was entered by Chief Judge Laws with the consent of Assistant Attorney General Thurman Arnold, who had also signed the original judgment some eight months earlier.

[9]The Jurisdictional Statement states (p. 20): "2. We believe that the district court erroneously *ruled* that any ambiguity in the decree 'had been resolved . . . [etc.].'" [Italics supplied]. The ruling of the Court was that there was *no* ambiguity.

On the next day, March 25, 1958, the order containing the four separate ordering paragraphs, described *supra*, pp. 3-4, and reproduced in Appendix A, *infra*, pp. 19-20, was signed by the Court in open court.

ARGUMENT

I

THE GOVERNMENT'S APPEAL SHOULD BE DISMISSED INSOFAR AS IT PURPORTS TO BE AN APPEAL WITH RESPECT TO INTERSTATE AND TUSCARORA.

Rule 10(2)(a) of the Revised Rules of this Court provides that the notice of appeal "shall designate the judgment or part thereof appealed from, giving its date and the time of its entry".

The Government's notice of appeal (App. B, *infra*, p. 21) states only that appeal is taken from the "Order of March 25, 1958, denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipeline Company", thus specifying that separate part of the order as the determination of the Court below which it seeks to have reviewed.

The time to appeal from the other three parts of the Order of March 25, 1958 expired on May 24, 1958, sixty days after entry. 62 Stat. 961 (1948), 28 U. S. C. § 2101 (b). Those parts of the order are therefore final and non-appealable. *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412, 415 (1943).

This is not a situation of a technical mistake in description or form, or of timely designation of a non-appealable order, or part thereof, instead of a concurrent appealable order. Compare *Hoiness* v. *United States,* 335 U. S. 297, 300-1 (1948); *United States* v. *State of Arizona,* 346 U. S. 907 (1953); *State Farm Mutual Automatic Co.* v. *Palmer,* 350 U. S. 944 (1956).

This is clearly a situation where the Government expressly appealed from one appealable part of an order and did not appeal from the other appealable parts. See *Gannon v. American Airlines, Inc.*, 251 F. 2d 476, 482 (10th Cir. 1957), discussed *infra*, pp. 13-14.

That the Government has appealed here simply from the denial of its motion against Arapahoe is plain not only from the face of its notice of appeal, but also from its Jurisdictional Statement.

In the first section of the Jurisdictional Statement entitled "Opinion Below", the Government, after stating that no opinion was rendered by the District Court, continues (p. 1): "The oral statements made by the court *in denying the Government's motions* are set forth in Appendix A . . ." [Italics supplied] Nowhere in its Jurisdictional Statement does the Government deal with the petition of Interstate and Tuscarora, the granting of which affirmatively established in all respects the meaning of the 7% of valuation clause of the 1941 judgment.[10]

The Government's appeal, as well as its Jurisdictional Statement, are of a piece with its procedure in the Court below.

There, the Government singled out a company formed in 1954 and in operation for only 3 years at the time of its motion as the vehicle through which it might obtain an interpretation of a judgment consented to by some 79 companies 16 years earlier that was at variance with the consistent interpretation and administration of that judgment throughout the period. The Government not only deliberately failed to serve the other parties to the action; indeed, it insisted that it did not have to because what it was seeking was only an "enforcement" of the judgment against Arapahoe and not a "construction" of the judgment. See, *e.g.*,

[10]Nor does it deal with the general prayer for relief in the statements filed on February 12 and 13, 1958 by 12 other defendants.

Transcript of Feb. 19, 1958, p. 21. It did not make such service until ordered by the Court below.

The Government in this Court now follows the form of serving its appeal papers on all defendants, as well as Arapahoe, but again it pursues the technique of limitation to Arapahoe. Such service cannot obscure the fact that the appeal was limited to a single paragraph of the order of March 25, 1958, and it cannot cure the limited nature of the appeal.

From the above it follows that no appeal now lies from those separate parts of the District Court's order granting our petition and affirmatively decreeing the meaning of the phrase "its share of seven percentum (7%) of the valuation of such common carrier's property" and rights thereunder.

Insofar as the present appeal purports to be an appeal as to Interstate and Tuscarora, therefore, the appeal should be dismissed.

II

THE PART OF THE ORDER DENYING THE MOTION AGAINST ARAPAHOE SHOULD BE AFFIRMED BECAUSE THE UNAPPEALED CONSTRUCTION PARAGRAPHS DETERMINE THE ISSUE

Since the general construction paragraphs of the order of March 25, 1958 have not been appealed from, the question raised as to Arapahoe does not warrant consideration by this Court. Those unappealed and therefore final portions of the order determine against the Government any construction question raised by the prayed relief against Arapahoe. To permit the appeal against Arapahoe to be heard therefore would be anomalous.

See *Gannon* v. *American Airlines, Inc.*, 251 F. 2d 476 (10th Cir. 1957), where American had interpleaded Britton and Clinic to determine conflicting claims to a fund

and Dowell had intervened as a claimant. Judgment was entered for Dowell and against Britton and Clinic. The appeal notice of Britton and Clinic designated the judgment in favor of Dowell, but did not designate that appeal was taken from the entire judgment or from the provision of the judgment denying their claims.[11] Dismissing their appeals, the Court ruled (p. 482) that the provisions of the judgment denying their claims having become final because not appealed, they could not be heard to contend on appeal that they were aggrieved by the action of the Court below in awarding a portion of the fund to Dowell.

III

THERE IS NO SUBSTANTIAL QUESTION AS TO THE CLEAR MEANING OF THE 7% OF VALUATION CLAUSE.

Apart from the above considerations, and assuming *arguendo* that the question of the construction of the 7% of valuation clause is available for appeal, the Government's contention is without substance.

The Government is attempting to re-write the language and bring to this Court a completely new construction of a clause in a consent judgment entered over 16 years ago. This attempted construction is at variance with the judgment's plain meaning as consistently understood and administered by the Government as well as the defendants throughout that period.

The substantive merits of the 1941 judgment are not involved. The Government has not sought and cannot

[11] Rule 73(b) of the Federal Rules of Civil Procedure provides, like Rule 10(2)(a) of the Revised Rules of this Court, *supra*, p. 11, that "The notice of appeal . . . shall designate the judgment or part thereof appealed from; . . ."

argue here for a modification of the judgment, although, as we shall show, the interpretation it urges would amount to abandoning the judgment as now written in clear and precise English.

It would hardly be possible to express intention more precisely than the judgment expresses it. The words, "its share of seven percentum (7%) of the valuation of such common carrier's property", can mean only what they say: that the stockholders' allowable participation in pipe line earnings is 7% of the valuation of the carrier's property, meaning valuation, not stock investment, and total valuation, not partial valuation. The word "share" in this context has an unmistakable meaning as referring to a relation among stockholders, not to a relation between stockholders and creditors, and not to a share of valuation.

The judgment naturally provides how each shipper-owner (several pipe lines had two or more shipper-owners) should be "entitled to participate in the net earnings" (paragraph II) of a defendant carrier in which it shared ownership. That formula was naturally and clearly expressed by the provision that each shipper-owner would be permitted to receive "its share" of the earnings, up to the limit allowed, which was 7% of valuation.

Not only are the words and meaning thus clear, but it is equally clear that if the expert draftsmen who concerned themselves with this judgment had any such idea in mind as the Government now suggests, they would have employed words altogether different to express with precision the thought the Government now asserts they had in mind. They would have specified that there would be deducted from valuation some precisely determinable amount attributable to debt; or they would have specified some formula based

upon the amount of investment of a shipper-owner.[12] They would never have used the phrase "share of seven-percentum (7%) of the valuation" either to mean what the Government suggests or to mean anything different than the division between shareholders of the total allowable dividend based on total defined "valuation".

A basic fallacy in the Government's thinking, and the error into which it would lead the Court, is its assertion that the final judgment of December 23, 1941 put a limit on "return on investment" (Jurisdictional Statement, pp. 15-16, 18). Neither the phrase "return on investment", nor the concept, appears at any place within the operative provisions of the judgment. The judgment sets a limit on the amount of dividends that may be paid to shipper-owners *based on the current valuation of the carrier's property*, and specifically permits dividends within such limits to be paid if earned.

A related fallacy in the Government's approach is that it assumes that dividends as an ordinary incident of ownership are a rebate, and that the theory of the Government's complaint was valid in its inception and established by the judgment.

There is nothing in the Elkins Act or in any decision under the Elkins Act which forbids ownership in whole or in part of a pipe line by a shipper-owner, or which attempts to regulate the capital structure or borrowing power of a petroleum pipe line, or which militates against

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[12]In the Government's motion against Arapahoe, the prayer requests a "*deduction*" from "*valuation*" of the "share of such valuation that is the result of or attributable to monies obtained by the carrier from third parties." In the Jurisdictional Statement (pp. 16-17), the Government's formula offers on the surface to accept full valuation as the basis of computation of "permissible dividends", but then recomputes the dividends payable according to a newly devised ratio of "investment" to "invested capital" (including long term debt), which has no basis in the language of the judgment.

an owner's enjoying the ordinary incidents of ownership, including the receipt of dividends from earnings.[13]

The Government is also wrong in its premise that the theory of its complaint was either accepted by the defendants or written into the judgment. While the Government may have instituted this action over 16 years ago with the theory in mind that the Elkins Act was being violated by shippers' owning stock in the pipe lines and receiving dividends from earnings, the significant fact is that, against the solid contention of the defendants that the Elkins Act had no applicability to the stockholder relationship between the oil companies and the pipe lines, the claim was not pursued to litigation or adjudication but was settled at the outset by a mutually accepted method of operation in the future, which was approved by the Court.

Even a modification of a consent judgment may not be secured merely on a showing of inadequacy in its provisions or even error in the application of the law. *Swift & Co.* v. *United States,* 276 U. S. 311, 331-2 (1928); see also *United States* v. *Radio Corporation of America,* 46 F. Supp. 654, 656 (D. Del. 1942). *A fortiori,* such proscribed result cannot be achieved through a new *interpretation. Hughes* v. *United States,* 342 U. S. 353, 356-7 (1952).

Finally, the Government raises a false issue when it states (Jurisdictional Statement, pp. 22-3) that, in looking solely to the application of the judgment in the future, the Government's acquiescence in the construction consistently followed by the defendants and consistently reported annually to the Government is immaterial and that principles of "acquiescence, laches, or failure to act" should not bar it from urging a novel view of a plain meaning. The point is

[13] *United States* v. *Union Stock Yard Co.,* 226 U. S. 286, 308-9 (1912), cited at page 18 of the Jurisdictional Statement in support of the proposition that a dividend is a "device" for "giving an illegal rebate", does not so hold. The case is an example of a favored shipper receiving a flat cash bonus for its business from a carrier with which it had no ownership connection, a typical violation of the Elkins Act.

that 16 years of administration of the judgment have established its interpretation beyond any question. *United States* v. *Chicago, North Shore & Milwaukee Railroad Co.*, 288 U. S. 1, 13-14 (1933); *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956).

Consciously and knowingly the Government has approved the administration of the judgment for 16 years, and that administration is not only conclusive but persuasive beyond doubt that the meaning consistently accorded the judgment is correct.

To say now, in the face of the unambiguous language of the judgment and after 16 years of advertent administration, that permissible dividends are to be figured on a radically different basis by a newly constructed formula, is to raise a question devoid of substance and unworthy of the extended attention of this Court.

CONCLUSION

We submit that the motion to dismiss, or, in the alternative, to affirm, should be granted and that this Court should dispose summarily of this insubstantial appeal.

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August 22, 1958

Appendix A

The District Court's Order of March 25, 1958 reads as follows:

ORDER

Plaintiff having moved on October 11, 1957, for an order directing Arapahoe Pipe Line Company to carry out the judgment herein entered December 23, 1941, and the Court having entered an Order herein March 10, 1958 directing plaintiff to serve its motion upon all defendants in this action, and defendants Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, having filed on February 5, 1958, their petition for "Order to Confirm Rights Under the Judgment of December 23, 1941", both the motion and the petition presenting the same question of construction of the judgment of December 23, 1941; Now

Upon the final judgment entered on consent December 23, 1941, the order entered on consent on August 3, 1942, on the petition of Great Lakes Pipe Line Company, the motion of plaintiff entitled "Motion for Order for Carrying Out Final Judgment" against Arapahoe Pipe Line Company filed October 11, 1957, the verified response of Arapahoe Pipe Line Company filed January 20, 1958, the verified statement of additive facts and prayer for relief of the defendants Magnolia Pipe Line Company, The Texas Pipe Line Company, Plantation Pipe Line Company, Shell Pipe Line Corporation, Sinclair Pipe Line Company, Service Pipe Line Company, Great Lakes Pipe Line Company, Cities Service Pipe Line Company, Texaco-Cities Service Pipe Line Company, Texas-New Mexico Pipe Line Company, Continental Pipe Line Company and Humble Pipe Line Company filed February 12 and 13, 1958, pursuant to the stipulation of January 30, 1958 approved and so ordered by the Court, the petition of Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, for an "Order to Confirm Rights Under the Judgment of December 23, 1941" filed February

5, 1958, and the answer of plaintiff to said petition dated February 21, 1958; AND

After hearing counsel for all parties herein desiring to be heard upon the foregoing record, and there being no disputed questions of fact, and the Court upon due consideration having rendered its opinion at the conclusion of the hearing on March 24, 1958, it is this 25th day of March, 1958

ORDERED that plaintiff's motion for an "Order for Carrying Out Final Judgment" against Arapahoe Pipe Line Company be and the same hereby is in all respects denied; and it is further

ORDERED that the prayer for relief contained in the Statement Pursuant to Stipulation of January 30, 1958 and the petition of defendants Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, be and the same hereby are granted; and it is further

ORDERED that the valuation of common carrier's property on which the shipper-owner's permissible dividends may be computed is the valuation of the carrier's property as provided in the judgment entered December 23, 1941 without deducting the amount of any indebtedness from such valuation; and it is further

ORDERED that defendant common carriers are permitted to pay dividends to their respective shipper-owners on the basis of such computation.

R. B. KEECH
Judge

Appendix B

The Notice of Appeal reads as follows:

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

United States of America, *Plaintiff*, v. The Atlantic Refining Company, et al., *Defendants*.	Civil Action No. 14060

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that the United States of America, plaintiff in the above entitled cause, hereby appeals to the Supreme Court of the United States from the following final orders of the district court entered in this action:

[This paragraph 1 is the subject of this motion.]

1. Order of March 25, 1958, denying plaintiff's motion for an "Order for Carrying Out Final Judgment" against Arapahoe Pipeline Company.

2. Order of March 26, 1958, denying plaintiff's motion for an order directing Tidal Pipeline Company to carry out the judgment.

3. Order of March 26, 1958, denying plaintiff's motion for an order directing defendant Service Pipeline Company to carry out the final judgment.

This appeal is taken pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 49 U. S. C. 45.

II.

The Clerk will please prepare a transcript of the record in the above entitled cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the entire record in this case.

III.

The Government's complaint in a suit under the Interstate Commerce Act and the Elkins Act charged that common carrier pipeline companies had departed from published tariffs and had given illegal rebates through the payment of dividends to their oil company owners, which also were their principal shippers. A consent judgment entered in the case prohibits the carriers from paying any dividends to a shipper-owner "which in the aggregate [are] in excess of its share of 7 per centum (7%) of the valuation of such common carrier's property * * *." The judgment further provides that "Valuation as hereinabove used shall mean the latest valuation of such common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission"; and that such valuation is to be adjusted by adding thereto the value of "additions and betterments," and subtracting therefrom the value of "depreciation and retirements," computed by the carrier "as of the close of the next preceding year * * *."

The following questions with respect to the construction of the judgment are presented by this appeal:

1. Whether a shipper-owner's "share" of 7% of the common carrier's property valuation is limited to that proportion of 7% of such valuation which represents the ratio of the shipper-owner's investment in the carrier to the carrier's total invested capital, including long-term debt.

2. Whether a common carrier in determining the valuation of its property "owned ~~and used~~" for common carrier purposes, may include property which it uses but does not own.

3. Whether a carrier, in making adjustments "as of the close of the next preceding year" to reflect increases and decreases in its final valuation, may include increases and decreases which occurred after the close of such year.

. . . .

DANIEL M. FRIEDMAN

. . . .

ALFRED KARSTED

. . . .

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Appendix C

Paragraph III, and its subparagraph III(a), of the judgment of December 23, 1941 read as follows:

> III. No defendant common carrier shall credit, give, grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum.
>
> (a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission. Such valuation shall not include the value of the

common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account as provided in paragraph V hereof.

Paragraph V of the Judgment of December 23, 1941 reads as follows:

V. Commencing January 1, 1942 each defendant common carrier shall retain (except as hereinafter provided) net earnings derived from transportation or other common carrier services in excess of the amounts permitted to be credited, granted, paid or given by paragraph III hereof and transfer such excess earnings to the surplus account within 90 days after the end of each calendar year. The said excess earnings shall be transferred to the surplus account as a separate item therein and in such a form as to be readily identifiable. The excess earnings thus transferred to the surplus account may be used by the defendant common carrier for extending existing or constructing or acquiring new common carrier facilities, for maintaining normal and reasonable working capital requirements during the current calendar year, and for retiring of any debt outstanding at the time of the entry of this judgment and decree, provided, however, that such debt or refunded debt was originally incurred for the purpose of, and the proceeds thereof expended in, constructing or acquiring common carrier property. In case of the dissolution, sale, transfer or divorcement of any defendant common carrier, any retained portion of the surplus account may be disbursed to stockholders of the corporation which owns and controls the defendant common carrier at that time.

Paragraph VIII of the Judgment of December 23, 1941 reads as follows:

VIII. Each defendant common carrier shall render a report to the Attorney General of the United

States not later than the 15th day of April of each year, showing for the preceding calendar year; the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof.

Appendix D

The prayer for relief in the "Petition for Order to Confirm Rights under the Judgment of December 23, 1941" of Interstate and Tuscarora reads as follows:

WHEREFORE, petitioners respectfully pray the Court to enter an order directing:

(1) that the term "its share of seven percentum (7%) of the valuation of such common carrier's property" in Paragraph III of the judgment entered December 23, 1941 means that proportion of 7% *of the entire valuation* (as valuation is fully and carefully defined in subparagraph III (a) of the judgment) which *each shipper-owner's equity interest* in the common carrier bears to the *total equity interest* in the common carrier;

(2) that the term "valuation used as earnings basis" in Paragraph VIII means the entire valuation as defined in subparagraph III (a) of the judgment;

(3) that the valuation on the basis of which permissible dividends to shipper-owners may be computed is the entire valuation as defined in subparagraph III (a) of the judgment, without deducting any indebtedness whatsoever from such valuation; and

(4) that defendant common carriers are permitted to pay dividends to their respective shipper-owners on the basis of such computation.

No. 210

In the Supreme Court of the United States

October Term, 1958

United States of America, appellant

v.

The Atlantic Refining Company, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OF INTERSTATE OIL PIPE LINE COMPANY AND TUSCARORA PIPE LINE COMPANY, LIMITED

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATLANTIC REFINING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OF INTERSTATE OIL PIPE LINE COMPANY AND TUSCARORA PIPE LINE COMPANY, LIMITED

All of the appellees have moved to affirm the orders of the district court. We believe that our Jurisdictional Statement fully meets those motions. In addition, appellees Interstate Oil Pipeline Company ("Interstate") and Tuscarora Pipe Line Company, Limited ("Tuscarora") have moved to dismiss the appeal as to them, on the ground that the Government did not appeal from those portions of the order which adjudicated their interests.[1] In order to answer this contention, a somewhat fuller statement of the proceedings in the district court is necessary.

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[1] Twelve other appellees have joined in that motion.

The complaint in this case, filed in December 1941, named as defendants 52 common-carrier pipelines and their 27 oil company shipper-owners, including Interstate's predecessor (Oklahoma Pipe Line Company) and Tuscarora (then known as Tuscarora Oil Company, Limited) (Motion of Interstate and Tuscarora to Dismiss or Affirm, pp. 5–6). A consent judgment, signed by all the defendants, was entered on the same day on which the complaint was filed.

On October 11, 1957, the Government instituted four proceedings against four different defendants for construction of various provisions of the judgment.[2] One of these proceedings, brought against appellee Arapahoe Pipe Line Company ("Arapahoe"),[3] involved the provision in the judgment which prohibits any carrier from paying any dividends to a shipper-owner "which in the aggregate [are] in excess of its share of 7 per centum (7%) of the valuation of such common carrier's property * * *.". The motion alleged that Arapahoe had "computed dividends for its shipper-owners in excess of its shipper-owners' share of 7% of the valuation of Arapahoe's property in violation of the judgment," and sought injunctive (and any other "appropriate and necessary") relief against such violation.

On February 5, 1958, Interstate and Tuscarora filed a "Motion to Dismiss Government's Motion and For Further Relief." This pleading, which dealt solely

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[2] One of those proceedings was settled by consent. See Jurisdictional Statement, note 2, p. 5.

[3] Arapahoe, organized in 1954, is a common carrier defendant for purposes of the judgment.

with the provision of the judgment involved in the Arapahoe motion, alleged that "the [Government's] motion, while in form a motion to carry out the judgment of December 23, 1941, against Arapahoe Pipe Line Company, is in substance a motion to construe and interpret Paragraph III of said judgment for the purpose and with the effect of adversely affecting thereby each party to this action and each person subject by its terms to said judgment, including Interstate and Tuscarora." Attached to the motion was a proposed petition by Interstate and Tuscarora for an Order to Confirm Rights Under the Judgment of December 23, 1941. Paragraph 8 thereof stated that "[a]s a result of the construction thus asserted in * * * [the Government's motion against Arapahoe], a controversy now exists between the Government and the petitioners, as well as other defendant common carriers, as to the meaning of Paragraphs III and VIII of the judgment of December 23, 1941, and of the rights and obligation of said defendant common carriers thereunder." In a memorandum in support of the motion (filed February 25, 1958), Interstate and Tuscarora stated (pp. 3-4) "that in every substantial sense the rights and obligations of every defendant [in the consent judgment of December 23, 1941] are involved and would be virtually determined by the judicial construction of the Judgment sought by the Government in this proceeding."

Interstate and Tuscarora contended in their motion and petition that Arapahoe's construction of the judgment, which they also followed, was correct.

On March 10, 1958, the district court ordered the Government "to serve all defendents [including Tuscarora and Interstate] in this action with its motion papers on its said motion," and consolidated for hearing the Government's Arapahoe motion and Interstate and Tuscarora's petition for an order confirming rights under the judgment.

After hearing, the Court denied the Government's three motions. It further ruled that

> From that action by the Court, it follows that I hold that the interpretation of the decree which Judge Peck [counsel] requested in the Interstate and Tuscarora motion is the correct interpretation. * * * I will take an order to that effect (Tr. 134–135).

The court entered three separate orders (one on March 25, 1958, and two on March 26, 1958) denying the Government's three motions for construction of the judgment. The order of March 25, 1958, dealt with the provisions of the judgment involved in the Arapahoe motion. The order, after reciting that "both the motion [by the Government] and the petition [by Interstate and Tuscarora] present[ing] the same question of construction of the judgment of December 23, 1941," contains four ordering paragraphs. The first paragraph denies the Government's motion; the second paragraph grants Interstate and Tuscarora's petition; and the last two paragraphs spell out, in accordance with the court's ruling, the basis upon which the defendant common carriers may pay dividends to their shipper-owners.

The Government's notice of appeal stated that the Government "hereby appeals * * * from the following final orders of the district court, entered in this action: 1. Order of March 25, 1958, denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipe Line Company. 2. Order of March 26, 1958, denying plaintiff's motion for an order directing Tidal Pipeline Company to carry out the judgment. 3. Order of March 26, 1958, denying plaintiff's motion for an order directing defendant Service Pipeline Company to carry out the final judgment."

Interstate and Tuscarora contend (Motion to Dismiss or Affirm, pp. 11–13) that the Government, by referring to the order of March 25, 1958, as "denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipeline Company," has thereby limited its appeal to "the denial of its motion against Arapahoe"; and that the other three provisions of the judgment are not before this Court for review. They further contend (Motion, pp. 13–14) that since the "general construction paragraphs of the order of March 25, 1958, have not been appealed from * * * [t]hose unappealed and therefore final portions of the order determine against the Government any construction question raised by the prayed relief against Arapahoe"; and that "[t]o permit the appeal against Arapahoe to be heard therefore would be anomalous."

We submit, however, that the Government appealed from the entire order of March 25, 1958, and not just from the first ordering paragraph.

Rule 10 (2) of the Revised Rules of this Court provides that the notice of appeal "shall designate the judgment or part thereof appealed from." The Government's notice of appeal designated the "judgment[s] * * * appealed from" as "the following final orders of the district court entered in this action," followed by a description of the district court's three final orders of March 25 and March 26. The reference to the first order as the "Order * * * denying plaintiff's motion for an 'Order for Carrying Out Final Judgment' against Arapahoe Pipe Line Company" plainly was not intended to limit the appeal to that part of the order, but was merely a shorthand identification of an order which has no descriptive heading and which contains four ordering paragraphs.

If the Government had intended to limit its appeal to the first ordering paragraph, it would have specified that it was appealing only from a "part" of the order, by stating that it was challenging "that part of the order of March 25, 1958" which denied its motion for an order carrying out the final judgment against Arapahoe. See, *e. g.*, petition for writ of certiorari, *Federal Trade Commission* v. *Mandel Brothers, Inc.*, No. 234, this Term, p. 1 (certiorari sought "to review *that part* of the judgment * * * which modified the Commission's cease-and-desist order") (emphasis added). Here, on the contrary, "[t]he notice of appeal was from the entire judgment and it brought the judgment as a whole here for review." *Automobile Ins. Co.* v. *Barnes-Manley Wet Wash Laundry Co.*, 168 F. 2d 381, 386 (C. A. 10), certiorari denied, 335 U. S. 859.

The Government's motion and the Interstate and Tuscarora petition had been treated throughout the proceedings below as involving the identical issue. Indeed, the order of March 25, 1958, specifically so recited. In these circumstances, we submit that the Government was not required, in order to appeal from the court's ruling on that issue, to specify in its Notice of Appeal that it was appealing from each of the four ordering paragraphs of the order. It was enough that it stated that it was appealing from the order of March 25, 1958—an order which it further identified by referring to the first ordering paragraph which denied its motion against Arapahoe. Interstate and Tuscarora cannot complain that they were "prejudiced or misled," or that the notice of appeal did not "acquaint * * * [them] as to the judgment appealed from." *Martin* v. *Clarke*, 105 F. 2d 685, 686 (C. A. 7).

This Court should deny the motion to dismiss, and should note probable jurisdiction and decide the substantial questions which this appeal presents.

Respectfully submitted.

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September 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA, *Appellant,*

v.

THE ATLANTIC REFINING COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, *Appellant*, *v.* THE ATLANTIC REFINING COMPANY, *et al.*, *Appellees.*	No. 210

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

THE QUESTION PRESENTED

Petroleum pipelines, in the main, are owned by oil companies. They are used by their owners and other oil companies in common carriage of crude oil or petroleum products. Companies which ship over lines in which they have a proprietary interest are called "shipper-owners." In many of the pipelines ownership is shared by several shipper-owners.

Paragraph III of the consent judgment (R. 10) provides that no common carrier pipeline shall pay dividends in any year to any shipper-owner "in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, . . ." Paragraph III also provides, that a carrier "shall be permitted" to pay "said percentum" of the valuation.[1] "Valuation" is defined in Paragraph III(a) as

[1] "III. No defendant common carrier shall credit, give, grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant, or pay said percentum."

the "latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission."

The carriers have always computed permissible dividends for shipper-owners on the basis of 7% of defined valuation, and where ownership has been shared by two or more shipper-owners the dividends have been divided among them in accordance with their shares of ownership. For sixteen years, from 1941, the year the judgment was entered, until 1957, the Department of Justice accepted and agreed with this method of computation and administration of the decree.

In 1957, however, in this proceeding, the Department advanced the contention that the 7% should be computed on the shipper-owner's "investment" in the carrier rather than on the carrier's "valuation." The new interpretation was fashioned by transposing the words "7%" and "share" in the dividend formula, as if the decree read that each shipper-owner might receive "7% of its share of the valuation" instead of "its share of 7% of the valuation." As pleaded by the Government, the judgment would prohibit the payment to a shipper-owner of anything of value "in excess of 7% of the shipper-owners' share of such carrier's valuation, which share is only that proportion of the carrier's valuation that is the result of or attributable to the shipper-owner's investment in the carrier" (R. 176). The shipper-owners' "investment" was to be calculated by deducting from the "valuation" of the carrier's property "the share of such valuation that is the result of or attributable to money obtained by the carrier from third parties" (R. 28).

The question, in the light of sixteen years of accepted administration and consistent interpretation, is the meaning of the words, defining the permissible dividend which a carrier may pay to a shipper-owner: "its share of seven percentum (7%) of the valuation" of the carrier's property.

The Government purports to find a "textual ambiguity" in the wording of the decree. It submits that "the phrase 'share of * * * valuation'—if regard be had to the words alone—may refer either to shares as between stockholders (as appellees contend), or between stockholders on the one hand and creditors on the other.". Attributing a "share of valuation" to creditors, the Government contends that "the shipper-owner's 'share' of the carrier's valuation is the proportion which its investment in the carrier bears to the latter's total invested capital (including debt owed to third persons) and not, as appellees contend and the district court held, its proportionate share of total outstanding capital stock." Thus would the decree be construed to effect the intention the Government attributes to the decree, "to limit shipper-owners to a seven-percent return on investment and not, as appellees contend, to allow a seven-percent return on total valuation" (Brief, p. 9).

We must point out at the outset that there are no such words in the decree as the words the Government has cited as ambiguous and chosen to construe. By omitting with asterisks, in quoting the decree, the key words "seven percentum (7%) of", and ~~by rephrasing~~ the language of the decree for the statement of its contention, the Government has created and posed a non-existent "textual ambiguity." The judgment speaks of a shipper-owner's "share of *seven percentum (7%)* of the valuation" (italics ours), not of 7% of a "share of the valuation."

It is the appellees' (hereinafter called "defendants") contention that the decree is clear on its face, as the District Court held. The sharing of dividends, permissible in the amount of 7% of valuation, is between owners in proportion to their ownership, not between owners and creditors. Creditors are not mentioned in the decree. The decree did not contemplate and could not have contemplated a creditors' share of dividends. There is no such thing. Nor is there such a thing as a creditors' "share of valuation,"

if it might be assumed, contrary to fact, that the decree contained the words "share of valuation." Nor does the decree contain the words or concept of "return on investment." The allowable dividends are to be computed on the base of "seven percentum (7%) of the valuation" of the carrier's property. "Valuation" is clearly defined in the judgment.[2] The definition does not permit of a deduction for debt.

The defendants also contend that sixteen years of accepted administration have fixed the meaning of the decree beyond cavil. As the District Court stated, even if there had been ambiguity in the decree, the ambiguity has been resolved by sixteen years of practical construction.

STATEMENT OF THE CASE

The Government brought suit in December 1941 against fifty-two pipelines and twenty-seven shipper-owners. The complaint listed ten of the carriers as having two or more shipper-owners. The complaint alleged that, although the shipper-owners were paying the full applicable tariff rates filed with the Interstate Commerce Commission by the pipelines, the shipper-owners were receiving from the pipelines, under the "guise of dividends," payments which were "refunds, rebates and offsets from the regular tariff charges" in violation of Section 6(7) of the Interstate Commerce Act and Section 1 of the Elkins Act (49 U. S. C.

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[2] "III(a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission."

43). The theory of the complaint was that payment of *any* dividends by pipeline companies to their oil company owners constituted illegal rebates. The relief requested was treble damages and an injunction against the payment of dividends by pipelines to shipper-owners (R. 1-9).

The answers of the defendants denied that dividends received by the shipper-owners from the pipelines were in any way rebates or offsets against shipping charges. The position of the defendants was that the dividend payments were ordinary dividends unconnected with shipments and that the Elkins Act and Interstate Commerce Act (hereinafter referred to together as the "Elkins Act") had no applicability to the dividends paid or to the normal shareholding relationship between the pipelines and their shipper-owners.[3]

The defendants were willing, however, to stipulate to a limitation on dividend payments. The reason is relevant in view of the recital of events leading up to the entry of the decree contained in the Government's brief. The defendants were confronted with a treble damage claim estimated at a billion and a half to two billion dollars. Although the defendants considered the Government's Elkins Act theory a fantasy, caution over the novelty and size of the claim dictated a concession to avoid litigation. (Thompson, Testimony before Antitrust Subcommittee of the House Judiciary Committee).[4]

The concession was a substantial one. The judgment imposed an unprecedented dividend limitation upon an already regulated industry. At the time the judgment was entered the Interstate Commerce Commission had (and

[3]The answers filed by the 79 defendants are included in the Record but are not included in the Transcript of Record printed by the Clerk. The consent judgment recites that the answers of all defendants denied the substantive allegations of the complaint (R. 9).

[4]*Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary*, Part I, House of Representatives, 85th Cong., 1st Sess., pp. 1262-9. These materials are hereinafter cited as "*Hearings*, Part I."

still has) jurisdiction over the rates charged by the pipelines. In December 1941, the Interstate Commerce Commission had already determined rates to be reasonable for petroleum products pipelines which would yield a return to the carrier of no more than 10% on valuation. *Petroleum Rail Shippers Association* v. *Alton & Southern Railroad, et al.*, 243 I. C. C. 589, 663-5 (March 11, 1941). It had also issued in 1940 an order to show cause why a return to the carriers of 8% on valuation should not be fixed as reasonable for crude oil pipelines.[5] The Commission had also held that receipts of earnings by shipper-owners of carriers could not be considered rebates when rates were reasonable. *Lum* v. *Great Northern Railway Company*, 33 I. C. C. 541, 546 (1915); *Adriatic Mining Co.* v. *Chicago & North Western Ry. Co.*, 78 I. C. C. 611, 619 (1923).

Since the Commission, with full awareness of the ownership of petroleum pipelines, had specifically passed upon the reasonableness of tariff rates for petroleum products just before the entry of the decree, and was considering crude oil rates, the defendants naturally felt that a limitation on dividends was unwarranted (Thompson Testimony). The defendants accepted a compromise, however, and stand by it.

The consent judgment was entered, on the same day the complaint and answers were filed, "without trial or adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue." (R. 9).

Paragraph III of the judgment provides that no pipeline shall pay dividends in any year to any shipper-owner "in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, . . . but shall

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[5]A final order which issued in 1948 found that the rates under consideration had continuously been reduced and had not been shown to be unlawful. *Reduced Pipe Line Rates and Gathering Charges*, 243 I. C. C. 115, 143-4 (1940), 272 I. C. C. 375, 384 (1948).

be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum." (R. 10). "Valuation" is defined in the decree and there is no dispute about its meaning.

Paragraph VIII of the judgment requires each pipeline company to render a report to the Attorney General of the United States each year, showing "the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners. . . ." (R. 13).

Ever since the entry of the judgment in 1941 the pipeline companies have computed permissible dividends to their shipper-owners at 7% of the valuation of the carrier's property as defined in Paragraph III(a) of the decree. Dividends, of course, have not been paid except where earnings warranted the payment, and dividends have frequently been below 7% of valuation although earnings would have warranted full payment of the permissible amount.[6] Where ownership is divided among several shipper-owners the division of dividends among them has been in accordance with the ownership share of each owner. The pipeline companies have so reported annually to the Attorney General

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[6]The Government's brief repeatedly makes the observation that permissible dividends to the owners of Arapahoe, as computed in accordance with the decree, would produce returns of 50% to 70% on the owners' investment. The Government has chosen to ignore and not inform the Court that the dividends actually paid by Arapahoe to its owners have been about 1% on valuation (R. 33, 40-1). It is one of the elementary facts of business life that dividends to the full amount permitted by earnings are not paid to stockholders. Money is required for many uses, particularly if the company has a substantial indebtedness which must be liquidated. Arapahoe, for example, has made sinking fund payments in twice the amount required by its mortgage indenture (R. 40-1), undoubtedly in response to the realities of depletion of the oil fields serviced by the pipeline. This is exactly what the Government would have a carrier do with a sizeable portion of its funds available for dividends (Brief, pp. 24-5), although certainly it is permissible for the carrier to pay out the "permissible" amount in dividends.

the valuations used, the permissible dividends and payments made.

For the sixteen years following 1941, the reports were accepted by the Attorney General as according with the decree, and in other ways the Attorney General indicated his agreement with the manner in which the pipelines computed permissible dividends and paid dividends to their shipper-owners.

In 1957, at a time when a Congressional committee was investigating the consent decree program of the Department of Justice, and just before the committee held public hearings at which representatives of the Department were called as witnesses, the Department of Justice, on behalf of the Government, instituted against Arapahoe Pipe Line Company, incorporated in 1954, a proceeding denominated "Motion for Order for Carrying Out Final Judgment."

The motion noted the capital structure of Arapahoe Pipe Line Company, consisting of capital stock of the par value of $2,900,000, "which represents the investment made in the company by the Sinclair Pipe Line Company[7] and The Pure Oil Company" and $26,000,000 of debt represented by mortgage bonds. The motion mentioned the reports filed by Arapahoe Pipe Line Company with the Attorney General under Paragraph VIII of the judgment for the years 1954, 1955 and 1956, and alleged that the company was in violation of the judgment in that it had "failed to *deduct from the valuation of its common carrier property,* before computing its shipper-owners' permissible dividend, the *share of the valuation* of the company's carrier property financed by or *attributable to the aforesaid loans* of $26,000,000 from third parties." The motion further alleged that "As a result of its failure to *deduct the share of its valuation attributable to loans from third parties,* the defendant Arapahoe Pipe Line Company has computed

[7]Sinclair Pipe Line Company is a wholly owned subsidiary of Sinclair Oil Corporation.

dividends for its shipper-owners in excess of its shipper-owners' share of 7% of the valuation of Arapahoe's property in violation of the judgment." An order was asked "directing the Arapahoe Pipe Line Company, before computing the permissible dividends for its shipper-owners, *to deduct from the valuation* of its property owned and used for common carrier purposes the *share of such valuation* that is the result of or *attributable to moneys obtained by the carrier from third parties.*" (italics ours) (R. 23-8).

In short, the assertion, after sixteen years, was that "valuation" should be prorated between stockholders and creditors, and an owner's share of 7% of valuation should no longer be calculated on the basis of full valuation, as defined in the judgment, but should be calculated on the basis of valuation less an amount attributable to debt.

Twelve other pipeline companies, obviously equally interested in the issue, came into the Arapahoe proceeding as "parties in interest" (R. 90-1) and two other companies, Interstate Oil Pipe Line Company and Tuscarora Pipe Line Company, Limited, brought a proceeding by petition "to confirm rights under the judgment" as it had been administered for sixteen years (R. 92-103).

The Arapahoe, Interstate and Tuscarora proceedings were heard together in the District Court. All the companies showed that their dividend computations had been made in accordance with the judgment. They also pointed out that debt had existed in the capital structure of a number of the companies, including four of the multiple ownership companies, at the time the decree was entered (R. 111, 126, 144, 169, 171), and that other companies had contracted debt over the years in reliance upon the accepted construction of the judgment (R. 50, 102, 145-6, 166-7). They emphasized that the Attorney General had accepted their annual reports for sixteen years with full knowledge of the method of accounting employed and that no deduction for

debt had been made from valuation or from a shipper-owner's share of 7% of valuation (R. 43-7, 98, 111-2, 126-7, 146, 148-9, 167, 169, 171).[8]

After studying the briefs submitted and hearing argument, the District Court said:

> "I reach the conclusion, fortified by the arguments of today, that this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties after due deliberation and approved by the Court in 1941 and again in 1942 by the supplemental order.[9]
>
> * * *
>
> "I have stated to you that I find no ambiguity in the terminology of the decree. I think it is clear upon its face; but even if there had been ambiguity I certainly would be constrained to hold that ambiguity had been resolved through the practice of the defendants, acquiesced in by the Government after full disclosure, throughout the sixteen years." (R. 178).

The order entered by the District Court denied the Government's motion, granted the prayer for relief contained in the statement filed by the "parties in interest" and in the petition of Interstate and Tuscarora, ordered that "the valuation of common carrier's property on which the shipper-owner's permissible dividends may be computed is the valuation of the carrier's property as provided in the judgment

[8]The answer of Arapahoe asked the court to dismiss the Government's motion. A statement filed by the "parties in interest" and the petition of Interstate and Tuscarora asked not only that the motion be denied but also that the court affirmatively declare the proper application of the decree to be in accordance with the position taken by the defendants and the practice followed for sixteen years.

[9]The supplemental order of 1942 was an order entered, with the Government's consent, on a petition filed by Great Lakes Pipe Line Company in connection with a refinancing which retired equity capital and substituted debt. The petition and order are considered in Point II, *infra*, pp. 30-2.

entered December 23, 1941 without deducting the amount of any indebtedness from such valuation," and ordered that "defendant common carriers are permitted to pay dividends to their respective shipper-owners on the basis of such computation." (R. 181)

SUMMARY OF ARGUMENT

I. The decree is clear upon its face. The central provision of the decree, limiting the payment of dividends to a shipper-owner to "its share of seven percentum (7%) of the valuation" of the carrier's property, was framed in reference to the fact that ownership of many of the carriers was shared among two or more shipper-owners. Hence the words "its share" of 7% of the valuation were employed to make clear that an owner, where ownership of a pipeline was shared among several owners, could not receive 7% of the valuation but only its share of 7% of the valuation. "Its share" plainly means a share proportionate to shareholdings. The wording could not have been intended, as the Government suggests, to denote a sharing between owners and creditors.

The "ambiguity" which the Government suggests is simulated by distortion of the decree. By editing out the key words in the operative provision of the decree the Government has presented the phraseology as if it referred to a shipper-owner's "share of valuation" instead of "share of *seven percentum (7%) of* the valuation." Similarly, by shifting from the singular to the plural in paraphrasing the language of the decree, the Government attempts to make it appear that the decree refers to a "shipper-owners' [plural collective] share," connoting a class sharing, hence a sharing with another class, assumed to be creditors—whereas the actual wording of the decree, "its share," the individual shipper-owner's share—clearly denotes a

sharing strictly among owners in proportion to their ownership. There is no such thing as a creditor's share of a dividend, and the draftsmen of the decree in their careful wording could not conceivably have had in mind the intention which the Government attributes to them.

"Valuation" is precisely defined in the decree and means full valuation as so defined, without any deduction, such as the Government suggests, for debt or a creditor's interest. There is no basis in the decree for the Government's arguing that it was the intention of the draftsmen of the decree to make the shipper-owner's "investment," *i.e.*, its capital contribution, rather than "valuation" as defined, the basis on which the allowable 7% was to be computed.

The decree provides that a carrier "shall be permitted" to pay to shipper-owners "said percentum," *i.e.*, 7% of valuation. The full amount so payable may be paid in dividends. There are no grounds whatever for the Government's suggestion that only a part of "total permissible dividends" may be paid with the limited privilege of applying the balance to retirement of debt.

II. If it could be said that there is any ambiguity in the decree, the ambiguity has been resolved by the practice of the parties in administering the decree over a sixteen-year period. Annual reports have been made by the carriers to the Attorney General, as required by Paragraph VIII of the decree, and those reports have fully disclosed the manner in which the permissible dividends have been computed. The Attorney General admittedly has known that it has been the consistent and uniform practice to compute dividends on the basis of ownership shares of 7% of valuation without any deduction for debt. For sixteen years, from 1941 to 1957, the Attorneys General have accepted the annual reports without objection and have otherwise affirmatively indicated their concurrence in the accepted manner of computing permissible dividends. The administrative practice

has thus removed and resolved any conceivable ambiguity which might be asserted, and fixed the meaning of the decree beyond cavil.

III. The Government's attempt to rewrite the decree to conform with new theories of the application of the Elkins Act is inadmissible. Any differences over the application of the Elkins Act to pipeline ownership were resolved in the "final settlement" of the decree. It is not permissible for the Government at this late date to assert new Elkins Act theories and suggest that the decree should be reframed to accord with those theories. If consideration were to be given to the new Elkins Act views advanced, they would be found to be utterly untenable. But it is submitted that they may not even be considered.

The order of the District Court should be affirmed on the clear and established meaning of the decree.

ARGUMENT

I

THE DECREE IS CLEAR UPON ITS FACE.

The entire controversy in this case revolves around the words "its share" of 7% of the valuation, as used in the decree to define the permissible payment to a shipper-owner. It is respectfully submitted that the meaning of the words "its share" of 7% of the valuation, in their context, is clear beyond the possibility of misunderstanding.

An Owner's Share of Dividends Payable is a Share Proportionate to Shareholdings.

The provision of the decree under discussion is a dividend provision—a clause both limiting and providing for

the payment of dividends to owners. The overall limitation is to "7% of the valuation." The participation of the individual owner is limited to "its share," clearly meaning a share proportionate to shareholdings.

The central provision of the decree was framed in reference to the fact that ownership of many of the carriers—ten of them—was shared among two or more shipper-owners. As the decree in its references to shipper-owners and provisions for payments is framed in the singular—defining the limit of payment to "any shipper-owner"—the provision for permissible payment to a shipper-owner is "its share" of 7% of the valuation.

Without the sharing clause, each owner could have been paid 7% on valuation. The use and significance of the words "its share" are manifest at a glance if the words are observed in their context. We will quote, for demonstration, the operative clause with the "sharing" words in brackets. Nothing more need be said to see their purpose and import.

> "No defendant common carrier shall credit, give, grant or pay . . . to any shipper-owner . . . dividends . . . in excess of [its share of] seven percentum (7%) of the valuation of such common carrier's property. . . ."

The decree in its intention and expression is just as simple, natural and direct as the words imply. It can be made complicated or doubtful in meaning only factitiously. When it is remembered that the decree in this case was carefully and deliberately drafted by experienced counsel, it is ludicrous to suggest either that they intended something different from the plain meaning of the words employed or that if they had intended something different they would not have expressed it clearly. Particularly is it ludicrous to suggest that able lawyers, representing the Government and the oil industry, thought and spoke in the terms of a

creditor's share of dividends, and wrote of an owner's share of dividends as if the complement were a creditor's share.

We will deal in a moment with the contrived way in which the Government fashions an "ambiguity" and argues that the word "share" was used to denote sharing between owners and creditors. But prior thereto we will take up the Government's claim that the draftmen of the decree were also inept and mistaken in the use of the word "valuation."

"Valuation," as Precisely Defined in the Decree, Not "Investment," is the Prescribed Basis for Computing Dividends

The nub of the Government's argument is that the intention behind the decree was to impose a limited return on the capital contribution or "investment" of the oil companies in the pipelines, and to exclude from the "valuation" or "7% of the valuation" a part proportionate to creditors' investment.

Neither the phrase "return on investment," nor the concept, appears at any place within the judgment.

A word should be said in this connection about the Government's concept of the shipper-owners' "investment" in the pipelines. The Government would have the Court assume that the dollar capital put up by the owners is the extent of their contribution or commitment and that the chance of getting a return thereon up to a ceiling of 7% is ample compensation. Later we shall comment on the hazards of pipeline ownership and on the essentiality of ownership by the oil companies, which make a contribution, in planning, financing and providing management for the pipelines, far beyond the dollar amount of equity capital invested. It is on the strength of the shipper-owners' identification with the pipelines that lenders are willing to invest in pipeline construction.

In the case of Arapahoe, for example, the owners, Pure and Sinclair, entered into a "throughput" agreement with Arapahoe by which the oil companies committed themselves to ship enough oil through the pipeline to assure it of revenues to meet its obligations, and they agreed that, if for any reason Arapahoe should have insufficient funds to pay its obligations, they would advance the amount necessary to enable Arapahoe to pay its obligations (R. 52-64). The owners of other pipelines have made similar commitments (R. 146, 166-7, 169). But such commitments aside, the undertaking of a pipeline project by shipper-owners is the foundation on which the entire project is built and maintained. That undertaking cannot be expressed, appraised or rewarded in the terms of a dollar capital investment. Just as the decree did not employ the language of "investment," it did not contemplate anything like the Government's "investment" concept as the basis for calculating allowable dividends.

The Government seeks to explain the absence in the decree of words of "investment" by saying that the judgment used the phrase "share of seven percentum (7%) of the valuation," instead of providing for a 7% return on investment, in order to compensate for changes in the purchasing power of the dollar due to inflation, *i.e.*, to give the owners the benefit of the inflated base instead of limiting them to the book base for calculating allowable dividends (Brief, pp. 11, 27). There is no record citation to support the rationalization. It is completely imaginary on the part of Government counsel. But it is beyond imagination that the draftsmen of the decree would have used the words employed to express the intent attributed to them.

"Valuation," as made by the Interstate Commerce Commission, not "investment," was made the basis of calculating allowable dividends, and the draftsmen of the decree were precise about both inclusions and exclusions, leaving nothing to inference from ambiguous language.

The "valuation" used in the decree was the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission, with additions and betterments added, and depreciation and retirements of property deducted. Also excluded from "valuation" was property acquired through investment of "excess earnings," that is, earnings in excess of 7% of valuation (Paragraphs V and III(a)).

The Government interprets the words "owned *and* used" (emphasis added) in the "valuation" formula as excluding leased property, and professes to see, in such exclusion and in the exclusion of property acquired through the investment of excess earnings, an indication that a shipper-owner may not receive a return on property which is not attributable to its investment (Brief, pp. 29-30). The Government thus tries to avoid or counter the real significance of these provisions of the decree.

There is nothing in the record to indicate why leased property might not have been included in the valuation base.[10] But it may be noted that property "owned and used" is a regular category in Interstate Commerce Commission valuations, whereas there is no category in the Commission's valuations such as property "attributable to debt" or a valuation which excludes property "attributable to debt."

The reason for the exclusion of property acquired through the investment of excess earnings is quite apparent. As the purpose of the decree was to put a ceiling on the amount of dividends payable, and thereby impose an incentive to keep rates down, the dividend limitation provision was implemented by disallowing the building up of dividends through an increase in "valuation" effected by

[10]The question as to whether the decree excluded leased property from "valuation," raised in the Tidal motion, is not before the Court as the Government and Tidal have stipulated to a disposition of the appeal on the Tidal motion.

investing excess earnings in property which would be included in "valuation."

But the true significance casewise of the express limitations and exclusions in the decree lies in the demonstration that the draftsmen specified the intended limitations and exclusions with particularity. The absence of further qualifications on valuation makes it apparent that the valuation on which the 7% was to be calculated was total valuation, as defined, and not a valuation from which debt was to be subtracted.

Without making impracticability the issue, there should be a pause to ask what is "debt" or the "share of valuation attributable to moneys obtained from third parties," considering when and how equity capital and borrowed funds may have been invested from time to time and relative depreciation between them—complications and considerations which compelled counsel for the Government to confess in their reply brief in the District Court that . . . "the relief sought by the Government may present some difficult situations involving intricate problems of attempting to trace the valuation resulting from third party loans. These possible difficult problems, however, are not now before the Court . . ." All of these "difficult situations" and "difficult problems" are passed over by Government counsel, who are willing to assume that the draftsmen of the decree bequeathed them to the parties and the Court without a care as to how they might be involved or resolved.

It cannot be intimated that the draftsmen of the decree were not conscious either of the presence or prospect of debt in the capital structure of the pipelines or of the impact of debt on the decree. Not only did existing debt meet the eye but Paragraph V of the decree, respecting excess earnings, provides that excess earnings may be used "for retiring of any debt outstanding at the time of the entry of this judgment and decree. . . ." (R. 12)

Furthermore, if there had been any intention of deducting or taking account of debt in determining "valuation" and permissible dividends, Paragraph VIII of the decree,[11] which requires annual reporting by the carriers to the Attorney General respecting the "valuation" used and the computation of earnings and dividends, would have required due reference in the reports to debt and its deduction.

The reporting provision was inserted in the decree to give the Attorney General annually the vital statistics from which he could see at a glance whether the defendants were complying with the decree. If debt were to be deducted from "valuation," surely the amount of debt would have been made an item in the required reporting. If the shipper-owner's "share" of 7% of valuation were to be computed in reference to allegedly similar shares attributable to creditors or to debt, surely due reference to debt and its share in the computation would have been required. The omission of any reference to debt is proof that debt was not considered as any factor in calculating valuation or computing dividends.

The Asserted Ambiguity is Absent. It is Simulated by Distortion of the Decree.

It is impossible to find the meaning the Government imagines in the language of the decree. The premise of the Government's position is the assumption of an ambiguity requiring interpretation. But here the ambiguity as well as the interpretation is contrived.

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[11] "VIII. Each defendant common carrier shall render a report to the Attorney General of the United States not later than the 15th day of April of each year, showing for the preceding calendar year: the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof."

The Government submits that "the phrase 'share of * * * valuation'—if regard be had to the words alone—may refer either to shares as between stockholders (as appellees contend), or between stockholders on the one hand and creditors on the other." (Brief, pp. 9, 18)

We submit that the Government's entire argument falls—indeed it cannot rise—for lack of the alternative in the asserted ambiguity.

In the first place, there are no such words in the decree as "share of valuation". and the Government's elimination of the key words "seven percentum (7%) of" from the operative provision is a gross distortion of the decree. To make the abbreviation and consequent distortion duly clear we quote the vital provision of the decree, bracketing the words Government counsel have edited out, thereby altogether changing the sense of the language—"its share of [seven percentum (7%) of] the valuation."

In the second place, there is not the slightest suggestion in the decree of any thought or consideration of creditors' investment or a "creditor's share" in connection with the definition of "valuation" or formulation of the dividend limitation. It is beyond imagination that the draftsmen of the decree used or would consider using the phrase "share of 7% of the valuation," or even the Government's substituted phrase "share of valuation," as referring to shares between stockholders on the one hand and creditors on the other.

There is no such thing as a creditor's share of either valuation or dividends. Mortgage bondholders have a lien on property, not a share or part of any property. They have a right to fixed interest before earnings are calculated and before dividends are paid. They have no share or participation whatever in earnings or dividends.

Undoubtedly the reason counsel for the Government have chosen to use the words "share of valuation," instead

of the actual wording of the decree—"share of seven percentum (7%) of the valuation"—is that it seems conceivable to them that one might speak of a creditor's share of valuation, whereas certainly no one would ever speak of a creditor's share of a dividend. If the decree could be made to read, in defining the shipper-owner's permissible dividend, "7% of its share of the valuation," instead of the actual "its share of 7% of the valuation," the Government's suggestion of sharing between owners and creditors might be arguable; that is, if it could also be assumed that lawyers drafting a legal document might use the word rearrangement as referring to sharing between stockholders and creditors.

But the legerdemain with language is of no avail. Counsel for the Government must realize as much for they shift away from the approach employed in the District Court of honoring the 7% figure but cutting down on "valuation" by deducting what was deemed to be a creditor's share of valuation. Now "valuation" is kept whole and it is conceded that "When capital is borrowed by the carrier and invested in common carrier facilities, there is an immediate increase in the carrier's total valuation and, under the judgment, a corresponding increase in the total amount of permissible dividends" (Brief, p. 24). But now an attempt is made to cut down on the 7% payable and not permit payment of "the total amount of permissible dividends."

The purpose is accomplished, by further legerdemain with language and liberty-taking with the decree—by *creating a classification* of dividends and assigning to shipper-owners as a *class* only a part or *share* of the 7% payable. The affirmative provision of the decree, permitting the payment of "said percentum," is nominally observed by calling the 7% "total permissible dividends." But, anomalously, "total permissible dividends" may not be paid out as dividends, because it is said that the *shipper-owners* (plural collective) have only a "share of total permissible divi-

dends." (Brief, p. 24) The "share" comes back to the ratio of equity to debt.

Counsel for the Government write in their brief (p. 24) of a "shipper-owners' [plural collective] share" of "total permissible dividends," as if the wording of the decree spoke of shipper-owners as a class and of a class share of dividends, and as if the decree thus contemplated payment to owners of something less than the full allowable 7% of valuation. The same technique was employed in the motion instituting the proceeding and in the Jurisdictional Statement. In its motion the Government alleged that, by failing to deduct from valuation the share of valuation financed by debt, Arapahoe had computed dividends for its shipper-owners in excess of its "shipper-owners' share of 7% of the valuation" (R. 28). In its Jurisdictional Statement the Government said the case (the case terminating in the judgment) was settled by a dividend restriction limiting "the shipper-owners to *their* 'share' of 7% of the carrier's valuation" (italics ours) (Jurisd. St., p. 18).

The words "shipper-owners'" (plural collective) do not appear in the decree. There is no concept of class sharing in the decree. The only "share" mentioned is "its share," the individual "shipper-owner's" (singular) share. The sharing is between members of a class, not between classes. There is not the slightest warrant in the decree for the sharing Government counsel envision or for suggesting that the owners together may be restricted to some part, less than all, of "total permissible dividends."

Total Permissible Dividends—7% of Valuation—May Be Paid to Shipper-Owners.

It is to be noted that under the new analysis and phraseology the pretense of *creditors* having a share is not carried over to a share in "total permissible dividends." It is not indicated who is supposed to have the share that the owners do not have, but there is no suggestion that

any part of the "total permissible dividends" is to be paid to creditors. Counsel for the Government are content to pose a hypothetical illustrative case (Brief, p. 16) with what they regard as the "anomalous result," under the established construction of the judgment, of allowing a theoretically high return on invested capital. We suggest that the anomaly is in the result obtained under Government counsels' construction, leaving 90% of the "permissible dividend" in limbo.

A pipeline is posed with $2,000,000 of capital stock, divided equally between two owners, $18,000,000 in funded debt, and a valuation of $22,000,000. The "permissible dividend", the Government agrees, would be 7% of the total valuation of $22,000,000 or $1,540,000. But, says the Government, each shipper-owner's share would be only that part of the permissible dividend which its investment of $1,000,000 bears to total capital of $20,000,000, or 1/20th. Hence the maximum dividend payable to each owner would be $77,000, the maximum payable to both owners would be $154,000. This would leave $1,386,000 permitted to be paid as dividends with the paradox that no one would be permitted to receive such dividends.

There is no intimation as to what is to become of the 90% of the "permissible dividend" which is not permitted to be paid, except the suggestion subsequently made that the "difference between total permissible dividends and the shipper-owners' share of those dividends" can be used by the carrier to retire indebtedness. And, as a brand new idea, mentioned in the Government's brief for the first time, it is said that "as the indebtedness is retired, the shipper-owner's share of 7% of the new valuation increases until finally maximum dividends on the new base are allowed." (Brief, pp. 24-5) Or, as otherwise put, the shipper-owners get compensated "through the increase in permissible dividends which occurs as the indebtedness is retired." (Brief, p. 24)

Government counsel see in this new distinction between "permissible dividends," which may be paid, and "total permissible dividends," which may not altogether be paid, and in the new feature of permitting the "difference" between "permissible dividends" and "total permissible dividends" to be used to retire debt, the answer to all the troublesome problems presented by their interpretation of the decree. First, it is made the answer to the quandary of what happens to the remainder of the 7% of valuation which the shipper-owners would not be allowed to share. Second, it is advanced as an answer to the compelling argument of the defendants that the Government's interpretation of the decree would produce the unthinkable result of discouraging pipeline construction through normal financing by depriving the owners of the potential of profit from such construction. The potential would be partially restored, under the latest innovation, on the installment plan, as debt is retired through the application of the "difference" between "permissible dividends" and "total permissible dividends." Third, with belated recognition of the fact that the contribution of the oil companies to the pipelines far exceeds their capital contribution or "investment," it is said that the companies are "adequately compensated for any additional risks . . . through the increase in permissible dividends which occurs as the indebtedness is retired." (Brief, pp. 24-5)

We will not comment on the panacea thus tendered in amelioration of the impracticalities and inequities in the Government's proposed interpretation of the decree beyond pointing out that it has no basis in the decree, and is, indeed, contrary to all the Government has claimed and said up to this point.

As has been seen, there is no "*shipper-owners'* share" of "total permissible dividends." There is no reference in the judgment to a "*shipper-owners'* share" of anything.

Nor is there any possible justification for creation of a distinction between "permissible dividends" and "total permissible dividends." There is no "difference" between them; they are the same. The descriptive word "permissible" is drawn from the clause of Paragraph III of the decree which recites that the 7% of valuation "shall be permitted" to be paid to the shipper-owners. The permissibility is the permissibility of payment— total permissibility. There is no part or share of "total permissible dividends" or 7% of valuation which may not be paid out in dividends to shipper-owners. The defendants are not required to reserve any part of the permissible dividends with a limited privilege of employing the reserve to retire debt.

The inconsistency between the latest innovation and the basic position taken by the Government in this case is glaring. The thesis which the Government propounds is that the 7% allowable dividend should be computed on the basis of the shipper-owner's capital investment. If that were so, any earnings in excess of the amount so computed would have to be placed in the "surplus account" under Paragraph V of the judgment. While the surplus could be used to retire debt incurred in acquiring new common carrier facilities, the facilities so acquired could not be included in "valuation" upon which permissible dividends could be calculated (Par. III(a)). The Government brief points this out in the footnote at page 26. What the Government does not seem to perceive is that the "difference" between its calculation of "permissible dividends" and its calculation of "total permissible dividends," which is the difference between 7% on "investment" and 7% on "valuation," would be "excess earnings" under Paragraph V of the decree. When the Government suggests, therefore, that the "difference" may be applied to retiring debt, increasing "valuation," and increasing "permissible dividends," it is countenancing what would not be allowable under the decree if its basic premise

were sound. The Government cannot square its innovation with its interpretation of the decree.

Of course, neither the innovation nor interpretation can be squared with the decree. The decree (Paragraph III) affirmatively provides that the carrier *"shall be permitted* (in so far as the Interstate Commerce and Elkins Act are concerned) to credit, give, grant or *pay said percentum."* (italics ours) The permissibility of full payment of 7% of valuation may no more be read out of the decree than other interpretations of the Government may be read in.

Together the vital provisions of the decree dovetail into a pattern which is unmistakably clear. Paragraph III, the limitation and sharing provision, Paragraph III(a), the "valuation" provision, Paragraph V, the "excess earnings" provision, and Paragraph VIII, the reporting provision, all make clear that "valuation," as carefully defined, is the basis for computing dividends, and that the "share," to which each shipper-owner is entitled, is a share proportionate to shareholdings.

The Government is Seeking to Rewrite the Decree.

In the District Court the Government instituted the proceeding against a single pipeline, Arapahoe, describing the proceeding as one to "carry out" the final judgment. It resisted the claim of other defendants, that they were equally interested and entitled to be heard, by denying that the proceeding was a "construction" proceeding, and by denying even that they should be served with the motion papers (R. 97-103). Arapahoe was chosen for the test case undoubtedly because it had a high debt ratio,[12] and also

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[12]Because of the high debt ratio of Arapahoe the Government was able to use it as a "horrible example" of the large return which its owners might receive on their investment through the "7% of valuation" formula. But as we have previously pointed out the average dividend paid by Arapahoe has been about 1% of valuation.

because the Government hoped, by selecting a company which had been organized only shortly before, to avoid the precedent of practical construction which had long been given to the judgment with respect to the other defendants. A number of the other defendants succeeded in coming in as "parties in interest," however, and finally all defendants were brought in as the result of a combined motion and petition by Tuscarora and Interstate to dismiss the Government motion for failure to serve all defendants and to secure an affirmative order from the Court confirming the construction of the judgment which all parties had given to it for sixteen years (R. 90-1, 177).

Now the Government states that the proceeding was brought as a "construction" proceeding (Brief, p. 5). But even this characterization is a pretense. There are no words in the 7% provision which require or warrant construction. They are clear beyond doubt. The Government is actually seeking to rewrite the decree. Every suggested change in interpretation has been a departure from the decree.

The District Court readily perceived the true nature of the proceeding and frankly and fairly dealt with it and disposed of it. As the Court said with conclusive aptness—"... this decree is clear upon its face; and it being clear upon its face, I have no right to rewrite the agreement reached between the respective parties. ..."

II

ANY ASSERTED AMBIGUITY HAS BEEN RESOLVED BY THE PRACTICE OF THE PARTIES IN ADMINISTERING THE DECREE.

The administration of the decree over a sixteen year period answers any question of ambiguity posed. It also negates ambiguity and constitutes the best evidence of the

meaning of the decree. The parties mutually operated under the decree for sixteen years, with a full disclosure of all facts, without any difficulties of interpretation arising as to the meaning of a shipper-owner's "share of 7% of the valuation."

Nor has any new condition arisen which presents a problem. The Government has simply decided that it does not like the way the decree has been administered by common consent throughout its long life and that it wants to change the construction. For the sake of imposing an entirely new interpretation, the Government avidly confesses error on the part of five preceding Attorneys General and as many heads of the Antitrust Division of the Department of Justice.

This decree was not left to administration by the defendants with trust in their observance of it. The Attorney General who framed the decree incorporated fool-proof provisions for keeping a constant check on its observance and detecting any departure from its mandate. Annual reports were required from each pipeline, showing exactly how the allowable dividends and actual payments were calculated (Paragraph VIII, R. 13). The Attorneys General have known all these years that no deduction was made for debt in arriving at "valuation," and that no deduction was made for any alleged "creditor's share" in arriving at an owner's share of 7% of the valuation.[13]

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[13]The Attorney General, of course, knew of the debt existing in the capital structure of the pipelines at the time of the entry of the decree—the existing debt was referred to in the decree (Paragraph V, R. 12). The annual valuation reports of the Interstate Commerce Commission, which contain detailed information with respect to pipeline indebtedness, are sent to the Attorney General pursuant to Section 19(a)(h) of the Interstate Commerce Act. The Commission's Bureau of Transport Economics and Statistics publishes yearly statistical compilations showing the funded debt of each pipeline. The Attorney General has indicated familiarity with these publications in the administration of the decree (R. 130).

The point need not be labored. It is admitted. The answer of the Government to the Interstate and Tuscarora petition specifically admits, as to the annual reports of said defendants, which reports are typical of those rendered by all the pipelines, "each of such reports indicated that the petitioners used as a basis for computing the amount of the permissible 7% payment to its shipper-owners its total valuation without deducting any indebtedness from the said valuation base." (R. 175-6). As Government counsel "recognize" in their brief, the reports filed by the defendants indicated "on their face" that allowable dividends were calculated "on the basis of a seven-percent return on the carriers' total valuation." (Brief, p. 35).

But say the present spokesmen for the Department, the fact that the Department of Justice accepted the reports for sixteen years without objection did not indicate agreement with defendants' construction of the judgment: rather it was due to "changing views" within the Department and "preoccupation" with other enforcement problems which did not raise any question about the interpretation or observance of the 7% provision (Brief, pp. 35-7).

This is confession without avoidance. A clearer and more conclusive record of practical construction could not be stated. The fact that so much attention over the years was given to the administration of the decree by the Government attorneys, as is documented in the Government's brief (pp. 35-7), and that numerous questions about various items were raised—without disputing the applied interpretation of a shipper-owner's "share" of 7% of valuation [14]—only accentuates the Government's acquiescence in the accepted interpretation of the provision.

[14]The Government makes reference to a memorandum (Brief, p. 18) presented to the Department of Justice by Service Pipe Line Company in August 1950, which mentions the possibility of a shipper-owner's "share of 7% of the valuation" referring to shares as between owners and non-owners. The memorandum dismissed the possibility, pointing out reasons why "its share" must refer to shares as between owners (*Hearings*, Part I, p. 294).

The 7% provision was the heart of the decree; every other provision was implementation. When the Government asserts its preoccupation with the peripheral—knowing full well how the central provision of the decree was being administered—it admits in the most affirmative way its approval of that administration.

Furthermore, the Department's acquiescence in the administration of the decree was accompanied by other affirmative actions which denoted agreement with the accepted construction.

In August 1942, less than a year after the judgment was entered, the Government consented to the entry of a supplemental order which shows a contemporaneous understanding of the judgment consistent with the defendants' construction and wholly inconsistent with the Government's new construction. The Government only assumes, without conceding, that the order is wholly inconsistent with the Government's present position (Brief, p. 41).

The 1942 order—which was consented to by the same official who represented the Government in drafting the original judgment (Hon. Thurman Arnold)—approved a recapitalization proposed by Great Lakes Pipe Line Company and stated affirmatively that the plan was not in violation of the 1941 judgment (R. 143). The Great Lakes recapitalization plan contemplated that the carrier would issue $12,000,000 of debentures and pay out nearly the entire proceeds to its shipper-owners in reduction of capital. In sanctioning the substitution of debt for existing equity, and permitting payment to the shipper-owners at the time of an amount which could not have been collected under the decree for many years, the plan approved by the Court provided that permissible dividends which "would otherwise be permitted to be distributed" to shipper-owners would be reduced by an amount equal to the shipper-owners' proportion of interest on the debentures issued, and by the

amount, if any, by which payments on account of principal of the debentures exceeded depreciation charged against earnings (R.135-40). Great Lakes had outstanding debt at the time of $400,000 (R. 130-1). Of course, the supplemental order did not require any deduction from permissible dividends on account of interest on that debt.

Thus, the supplemental order recognized that except for the special charge made against the owners' 7% of valuation because of the extraordinary circumstances, the owners were entitled to receive dividends of 7% on valuation, including valuation "attributable" to debt.[15] If valuation could ever be attributable to debt, here was a conspicuous example of it. The conclusion is inescapable. In 1942 the defendants, the Court and the Department of Justice were in agreement as to the meaning of the 1941 judgment, and that is the meaning which the parties have mutually followed since then.

It is the Great Lakes supplemental order that the District Court was referring to when it said that it could not rewrite "the agreement reached between the respective

[15]The figures graphically demonstrate the point. Great Lakes in 1942 had a valuation of $15,545,000 (R. 131). Absent the supplemental order, Great Lakes could have paid dividends to its shipper-owners of 7% of this sum or $1,088,150. By reason of the supplemental order, the permissible dividends were reduced by interest (at 3¼%) on the $12,000,000 debt, or by $390,000, so that permissible dividends would be $698,150. If the Government's present interpretation of the decree had been in mind, the permissible dividends to the shipper-owners after the recapitalization would have been only that proportion of 7% of valuation which their capital stock of $2,470,014 bore to total invested capital of $14,470,014, or 17%. The maximum dividends which the carrier could have paid to its shipper owners under the new proposed construction of the judgment would have been 17% of $1,088,150 or $184,980, from which, obviously, there could not be deducted $390,000 interest on the debentures. The annual reports subsequently filed by Great Lakes with the Attorney General have all shown that permissible dividends have been calculated on the basis of 7% of full valuation without any deduction except that directed by the supplemental order, and no objection to this method of computation has been made by the Attorney General (R. 126-7).

parties after due deliberation and approved by the Court in 1941 and *again in 1942 by the supplemental order"* (italics ours) (R. 178).

In 1944, Senator Gillette wrote the then Attorney General, Honorable Francis Biddle, who was also the Attorney General at the time the decree was entered, and inquired whether the defendants had fully complied with the judgment. The Attorney General, who was personally fully familiar with the decree and who had personally participated in its formulation (*Hearings,* Part I, p. 1267), replied that he had examined the reports made by the defendants and that, with an exception not relevant to these proceedings, the reports reflected a general compliance with the judgment (R. 48). In explaining the dividend limitation, the Attorney General wrote "Thus the defendant oil company may receive profits from its own pipelines to the extent of 7 per cent of valuation."[16]

The fact that the Attorney General, who was a particular authority on the decree, with full knowledge of the facts, thus certified to general compliance with the decree on the part of the defendants, not only establishes accepted interpretation, but also removes any question of ambiguity.

There is no denial that the defendants relied and were entitled to rely on the accepted administration of the decree in the payment of dividends. Similarly, many of the defendants, like Arapahoe and its owners, relied on accepted administration in borrowing money and constructing pipeline facilities (R. 50, 102, 113, 127, 145-6, 166-7, 169). The construction of pipeline facilities over the period 1941-1957 would have been quite a different story if there had

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[16]The correspondence between Senator Gillette and Attorney General Biddle is printed at *Hearings,* Part I, pp. 73-4.

been any hint that no profit could accrue to the owners from such construction when financed through borrowing. It would be unconscionable to change the established interpretation after this long period of practical construction and reliance thereon in the issue and sale of hundreds of millions of dollars in pipeline debentures.

Government counsel seek to shunt aside the decree's administration over a sixteen year period by asserting the Government's immunity from the doctrine of estoppel for "acquiescence, laches or failure to act." (Brief, p. 42).

We need not pause for a discussion of the applicability of the equitable principles of estoppel when the Government is concerned, although, certainly, the Government as well as the defendants is bound by the decrees it enters into. *Hughes* v. *United States*, 342 U. S. 353, 356-7 (1952). The Attorney General's "authority to make determinations" even "includes the power to make erroneous decisions as well as correct ones." *Swift & Co.* v. *United States*, 276 U. S. 311, 331-2 (1928).

This is not a case like *United States* v. *San Francisco*, 310 U. S. 16 (1940) (Brief, pp. 39-40), where the defendant was contending against the clear meaning of a statute and the Court held that administrative rulings could not thwart "the plain purpose" of a valid law;[17] nor like *United States* v. *California*, 332 U. S. 19 (1947) (Brief, pp. 41-2), where the Court said ". . . officers who have no authority at all to dispose of Government property cannot by their con-

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[17] The Court said (p. 32): "As to estoppel, it is enough to repeat that '. . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.' (*Utah Power & Light Company* v. *United States*, 243 U. S. 389, 409)."

duct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."[18]

We are dealing here with what the Government asserts to be an ambiguous decree, in an area where the Attorney General has not only the authority of speaking and acting for the Government, but also the duty of enforcement. When the Attorneys General over a long period concur in the interpretation of a decree, there is a compelling case of practical construction fixing the meaning of the decree.

The Government does not suggest that it is exempt from the canons of practical construction. It concedes (Brief, p. 37) that its acquiescence in the long accepted construction of the decree is significant insofar as it supports defendants' construction of the judgment—which it certainly does.

As the Court said in *Norwegian Nitrogen Co.* v. *United States,* 288, U. S. 294, 315 (1933):

> ". . . The [administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.",

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[18]This case involved the issue of ownership, as between the United States and the State of California, of the submerged land off the coast of California. On the subject of estoppel this Court said (pp. 39-40):

> ". . . And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

In *United States* v. *Chicago North Shore & Milwaukee Railroad Co.*, 288 U. S. 1 (1933), a case in which the Court noted "the proper classification of the railway is not free from difficulty," the Court said (p. 14):

> "The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under § 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of ~~this~~ settled administrative interpretation."

See also *United States* v. *Zucca*, 351 U. S. 91 (1956); *United States* v. *Leslie Salt Co.*, 350 U. S. 383 (1956).

Surely in our case, without the "difficulty" of construction, or of "serious doubts" having been entertained by the enforcement agency of the Government, the construction consistently given to the decree by numerous Attorneys General has established its meaning beyond dispute over estoppel or practical interpretation.

Even more significantly, apart from the clarity of language employed by the authors of the decree to express their intention, the consistent administration of the decree over such a long period is the clearest indication of its true meaning and proof that no ambiguity exists. Just as the draftsmen of the decree could not possibly have intended the interpretation now assigned to their language by the Government, successive generations of Government lawyers were not in error in interpreting the decree in accordance with its plain meaning rather than as the Government would

now interpret it. The actual administration for sixteen years is not only conclusive, but persuasive beyond doubt that the meaning consistently accorded the decree is correct.

III

THE GOVERNMENT'S ELKINS ACT ARGUMENT IS INADMISSIBLE AND UNTENABLE.

The Government's excuse for attempting to rewrite the decree is the Elkins Act. Because the suit, terminating in the consent judgment, was started with an Elkins Act complaint, counsel for the Government seem to think that they may insinuate into the decree any theories they may entertain as to the application of the Elkins Act to pipeline ownership. Although the decree is a patent rejection of the Elkins Act theory with which the suit was started—a theory that payment of any dividend to shipper-owners is a rebate—and although the judgment was entered without admission or adjudication, counsel for the Government, citing litigated cases to the effect that the statute may be looked to in aid of interpreting ambiguous judgments, maintain that the "design of the judgment" must be found in "looking to the complaint, the purpose of the statute." (Brief, p. 9). Not finding the apparent design to their liking, revision is sought, no matter with what violence to language.[19] And

[19]So plain was it made in the District Court that the attack was upon the decree itself, that the impression was given that the Government was seeking an abandonment of the decree as a violation of the Elkins Act. Hence, the District Court, although understanding that it was not called upon to decide any Elkins Act question, felt impelled to say in its statement of decision:

> "I do not treat the proceeding before me as asking for abandonment of the decree in toto. Actually, if required to act upon such a request, I would not hold that the decree as it has been interpreted by the parties over a period of sixteen years violates the Elkins Act." (R. 178).

the Government's brief has become an interpretation of the Elkins Act and only a consequential "interpretation" of the decree.

The case which should be cited in this connection is *Hughes* v. *United States,* 342 U. S. 353, 356-7 (1952), where the Court held that "new terms" may not be read into the "detailed plan" of a consent judgment "to achieve the purposes" the Attorney General thought he perceived in the decree.

The Elkins Act Controversy was Settled. It may not be Revived.

With due respect to the Attorney General, we do not feel called upon to argue over again the alleged application of the Elkins Act to the shipper-owner relationship. It has always been the position of the defendants that there never was an Elkins Act problem or rebate incidence in connection with ownership of the pipelines and payment of dividends, and that no change of practice with respect to the payment of dividends was required by the Elkins Act. But certainly this appeal is no occasion to retrace ground covered almost two decades ago. The decree was framed to resolve and remove any Elkins Act question. The defendants are not entitled to renege on their consent to the judgment or revert to a pre-judgment position which they have always regarded as sound. No more may the Government undo the decree and under the guise of interpretation litigate an issue which was withdrawn from contest and resolved by consent long ago.

The Government speaks of the judgment as a compromise. We agree. It was, by its own terms, a compromise in "final settlement" of all claims. Are we expected then—

after sixteen years of settled administration—to ignore the settlement and litigate *de novo,* but without a trial, under the guise of an enforcement or construction proceeding, a new Government theory of the applicability of the Elkins Act to pipeline ownership?

We take serious exception to the Government's arguing that the settlement as made and administered does not accord with the Elkins Act, and to its arguing at this late date, without evidence, factual record or legal authority, after litigation was avoided and the defendants surrendered their right to defend and agreed with the Government on a *modus operandi* which has been observed by all parties for sixteen years, that the settlement may be reformed to accord with the Government's current notion of the requirements of the Elkins Act.

The most that can be said for that notion is that conceivably, after litigation, as an original matter, the Court might have accepted the view and have framed a judgment along that line, just as it might have, and we believe certainly would have, dismissed the complaint. But we submit that the Government may not now say that the compromise reached was not a permissible compromise or suggest that the Elkins Act can be complied with only by accepting its present interpretation of the decree. There is nothing, apart from Government counsel's mere say-so, to support an argument that the line of compliance with the Elkins Act must be drawn between 7% on "investment" and 7% on "valuation"—that the former would comply and the latter would not. There is no precept to be drawn from Elkins Act concepts that a profit may not be made on borrowed capital. There is no law-given magic in the words "investment," or "valuation," or even in the figure "7%." Compromises and settlements need not, and probably cannot, be rationalized after the event. The settlement

here, like any settlement, speaks for itself and stands by itself. It is not admissible for either party to attempt to reframe it.

If the Government may be heard to say, contrary to the sixteen-year record of Departmental practice, that it cannot be assumed that the Government would have agreed to a settlement upon the accepted terms (Brief, p. 33), certainly the defendants may say that it is inconceivable that they would have accepted terms which the Government now puts forward, and have consented to anything as economically absurd as incurring all the risks and responsibilities of pipeline undertakings with the limited possibility, at best, of getting a 7% return on capital ventured.

The clear language of the decree, the applied construction of the decree, may not be set aside in a fresh consideration of Elkins Act ideology. It would undermine all consent judgment procedures, defeat the purpose and destroy the utility of consent judgments, if either party might be called upon years later to litigate the issues settled. We respectfully submit that the Government's argument is not even admissible.

The Government's New Elkins Act Theories are Untenable.

We have dealt fully and probably over-seriously with the Government's treatment of the language of the decree. We shall deal with its discussion of the Elkins Act, although we regard it as extraneous to the issue, in more compact form.

Although the basic claim of the Government was that the payment of dividends was a "guise" for a rebate, the

Government has never attempted to show any connection between the dividends paid and the shipments of any shipper. Admittedly, the challenged payments have been regular dividends, calculated and paid in exactly the same way that any enterprise would calculate and pay dividends to owners in ordinary course. Admittedly, also, all shippers have been treated alike in the faithful observance of established rates and tariffs. And, for certainty, the decree requires that payments by the pipelines to their shipper-owners be made in strict accordance with shares of ownership.

Without any factual basis for its basic contention, the Government now says, ipse dixit, that any receipt by the owners in excess of a 7% return on their capital contribution "must" be regarded as a rebate (Brief, p. 32). The underlying economic view seems to be that pipeline owners should be singled out and not allowed to engage in the normal business practice of borrowing money to construct facilities and to profit from the facilities so constructed. Starting with this premise, the conclusion is drawn, altogether inconsequently, that dividends from earnings "attributed" to assets "attributed" to debt must be considered a rebate.

The Government's position is stated in a series of propositions which purport to be a logical sequence—but in which every premise and conclusion is false. The investment of the owners in the pipelines is assumed to be only their capital contribution; a possible but by no means assured 7% return on capital is assumed to be a "fair return" for their investment; to the extent that dividends exceed a 7% return on equity capital it is said that they "would not be attributable to any contribution made by the shipper-owner, but only to capital furnished by third parties;" ergo, "they [dividends in excess of 7% on equity

capital] must be viewed as a partial return of amounts paid for transportation." (Brief, p. 32).[20]

Let us test each of these propositions by standards of reality.

1. *The investment of the owners in the pipelines.* Aside from the important contribution of equity capital, as the foundation of the enterprise, owners make other vital contributions to the pipelines in planning, building, financing, and responsibility for management. It is on the strength of such ownership undertakings, frequently accompanied by financial commitments in addition to capital contributions (R. 52-64, 146, 166-7, 169), that institutional lenders will lend money for pipeline construction. In the case of Arapahoe, for example, the owners made a "throughput" agreement which committed them to ship enough oil through the

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[20]It is interesting to note the assigned source of the theory propounded in this proceeding linking together the Elkins Act, the decree and the "7% return on investment" interpretation. Counsel for the Government in their District Court brief stated that the "theory adopted" in the final judgment and on which the "judgment was drafted" was that "the money invested by the shipper-owner in the carrier was analogous to a service furnished by the shipper to the carrier for which Section 15, paragraph 13, of the Interstate Commerce Act, 49 U. S. C. 15(13), permits the shipper to receive 'just and reasonable' payment . . . and the dividend figure was placed at 7% as a reasonable rate for the shipper-owner to earn on its investment in the carrier."

Section 15(13) is a tariff provision which permits a carrier by published tariff to grant some allowance to a shipper for furnishing a service or instrumentality in connection with transportation provided by the carrier to the shipper. The service or instrumentality is to be valued by the Interstate Commerce Commission on the basis of what would be a reasonable charge for it, and, of course, the amount fixed must not only be allowed but assured (Section 6(7) of 49 U. S. C.; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42 (1911); *Union Pacific R. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215 (1911)). So, assertedly, the inception of the Government's "investment" theory was the idea that equity capital, the heart and blood of an entire enterprise, should be valued as a box car or other item posted in a tariff. This mainstay of the District Court brief (there cited seven times) has become a mere passing reference as a "Compare" in the Government's present brief.

pipeline to assure its ability to meet its obligations, and they agreed that if for any reason Arapahoe should have insufficient funds to pay its obligations, they would advance the amount necessary to enable Arapahoe to pay its obligations. (R. 52-64). The owners' many contributions cannot be measured in the terms of dollar capital invested.

2. *A "fair return" on the owners' contribution.* Pipelines are a particularly hazardous investment, as the Interstate Commerce Commission has noted.[21] A pipeline is not movable but must have a permanently fixed position. It must start from an oil field and extend to a refinery, or start from a refinery and go to a market. While it may be a fair assumption that a market will not dry up, oil fields become exhausted and new ones become more prolific or more accessible and refining centers increase and shift. The use and value of a pipeline may change radically over a period of years. If on the downside, the investment will turn out poorly. If on the upside, a parallel or competing pipeline may be laid and take away the increased business—

[21]The Interstate Commerce Commission said in *Minnelusa Oil Corp. v. Continental Pipe Line Co.*, 258 I. C. C. 41, 51 (1944):

> "The operation of pipe lines for the transportation of crude oil involves risks and hazards which are not reflected in their operating expenses, but are matters of importance for consideration in determining a fair rate of return on value of such carrier property. The revenues and earnings of these pipe lines are dependent upon the volume of movement of one commodity in one direction. Volume of movement is not accurately predictable but is governed by variable factors, such as the ability of the shippers to develop or purchase oil in the fields reached by the pipe lines either directly or through connecting lines, changes in market demand, diminishment of the supply of oil in the fields served, and shifting of sources of supply through the discovery of new oil reserves or increased production nearer the refinery points."

The Interstate Commerce Commission took note of the equally hazardous nature of ownership investment in product pipelines in its decision in *Petroleum Rail Shippers' Association v. Alton and Southern Railroad*, 243 I. C. C. 589, 661 (1941).

for, unlike other transportation facilities, there is no limit or regulation on the construction of interstate oil pipelines.

Pipelines are owned almost entirely by oil companies.[22] Pipeline ownership is such a hazardous investment that independent investors are seldom attracted to a pipeline undertaking and can generally be interested only in taking a secured position with the assurance of oil company ownership and operation. It is utterly unrealistic to suggest that the risks of venture capital in this field, the "additional risks" the Government recognizes and refers to (Brief, p. 24), and all the contributions of the owners to the pipelines, are fairly appraised and compensated by a chance of receiving up to a ceiling of 7% on the dollar amount of equity capital.

3. *The attribution of earnings in excess of 7% on equity capital to capital furnished by third parties.* The expression of economic view on this subject in the Government's brief is just the opposite of accepted economic principle and practice. Fixed interest return goes to the lender in his preferred and secured position. The success of a business beyond paying expenses and interest on debt and in earning something is attributed to ownership, and the speculative reward is for the contributions of ownership. The idea of limiting owners to a fixed, but unassured, return on their capital, and attributing the success of the business to capital furnished by third parties, cannot be seriously entertained.

4. *Earnings viewed as a rebate.* Whatever might be said for the assumptions of the Government up to this point, the jump to the conclusion that earnings in excess

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[22]According to a list prepared in 1956 by the Committee for Oil Pipelines, there were at that time 99 crude and product pipelines in the United States. Less than 15 were owned by others than oil companies and, except for 3 or 4, they were short lines with limited throughput. This list is reproduced at pp. 1181-6 of *Hearings*, Part I.

of 7% on "investment" are a refund of shipping charges is groundless. Even if the premises were assumed to be sound, the conclusion tendered is a *non sequitur*. If the owners have profited from capital furnished by lenders, it is not at the expense of shippers, nor is it in any way a "device" or a rebate of shipping charges. Rather, the profit, if it accrues, is a reward for the calculated risk which an equity owner always takes in debt financing.

In the end, the Government does not adhere to this rebate analysis. It satisfies itself by calling the dividends "unduly high" and characterizes them as a "discriminatory rebate" regardless of any connection with debt financing (Brief p. 31). The dividends are called "unduly high" without any regard to the reasonableness, indeed the lowness, of rates, and without any reference to or recognition of the fact that rates come under the jurisdiction of the Interstate Commerce Commission and that the Commission has found the rates to be not only reasonable but low.[23]

[23] As the Interstate Commerce Commission observed in 1948, rates have steadily declined, more than 40% between 1933 and 1948, "the more remarkable, as every other type of common carrier in the same period has been forced to make general increases in rates." *Reduced Pipe Line Rates and Gathering Charges*, 272 I. C. C. 375, 384 (1948).

The Chairman of the Interstate Commerce Commission testified in 1957 before the Antitrust Subcommittee of the House Committee on the Judiciary that since 1948,

> "No one has suggested to the Interstate Commerce Commission that pipeline rates are too high.
>
> * * *
>
> "We have had thousands of rate cases involving other types of transportation since then, and we have not made an investigation of pipeline rates, merely because no one has questioned the reasonableness of them. None of the independent shippers or anyone else has complained to use [sic] that the rates were too high.
>
> "The independent shippers have complained to us that railroad rates, motor carriers, barge rates were too high, and we have had rate cases involving them, but not involving pipelines, because presumably everyone is satisfied." *Hearings*, Part 1, p. 484.

There is No Warrant for Remaking the Decree

The owners of the pipelines have been required to dedicate them to public use at rates which are controlled by the Interstate Commerce Commission. Pipelines receive no protection against competition of any kind, including other pipelines which may be laid anywhere at any time without any certificate of convenience or necessity. The hazards of pipeline ownership are so great that virtually only oil companies are persuaded to make the venture. Other companies need not make the investment but are accorded equal privilege of use on the same terms. They are protected both in rates and against rebates by the Interstate Commerce Commission. The decree imposes further limitations which are calculated to keep rates low. There is no showing that further limitations would serve either shippers' interests or public interests.

It is quite apparent, on the other hand, that shippers' interests and public interests would suffer by any measure which would remove the profit potential in borrowing to build and discourage pipeline construction by those most likely to engage in such construction.

Rates which are reasonable in law, and recognized by shippers to be reasonable in fact, have been allowed by the Interstate Commerce Commission. There is no excuse, therefore, for Government counsel saying that the pipeline owners are receiving "unduly high dividend returns." The Government persuaded the defendants to accept a certain ceiling on dividends. That limitation was clearly defined and has been faithfully observed for nearly two decades. There is no justification in fact, law or morals for the Government to invade the integrity of the decree, rewrite it, and set new standards which are compatible neither with the decree nor public interest.

Perspective on this Proceeding—the Question Presented

We feel that the Elkins Act discussion which dominates the Government's brief and occupies the latter part of this

brief is beside the point. We return, therefore, to the question presented, which is the meaning, after sixteen years of administration, of the words "its share," a shipper-owner's share, "of seven percentum (7%) of the valuation" of a carrier's property. We submit in the end, as in the beginning, that the meaning is clear beyond the possibility of misunderstanding. Seven percent of "valuation" means seven percent of "valuation," as precisely defined in the decree. "Its share" means the individual owner's share in relation to the shares of other owners. If there could be any question about it, which there cannot be, the question is resolved by sixteen years of consistent administration of the decree, in which five Attorneys General and their heads of the Antitrust Division have fully participated and completely concurred.

CONCLUSION

The order of the District Court should be affirmed.

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Appendix

Paragraph III, and its subparagraph III(a), of the judgment of December 23, 1941 read as follows:

> III. No defendant common carrier shall credit, give, grant, or pay, directly or indirectly, through or by any means or device whatsoever, to any shipper-owner in any calendar year, commencing as of January 1, 1942, any earnings, dividends, sums of money or other valuable considerations derived from transportation or other common carrier services which in the aggregate is in excess of its share of seven percentum (7%) of the valuation of such common carrier's property, if such common carrier shall have transported during said calendar year any crude oil, or gasoline, or other petroleum products for said shipper-owner, but shall be permitted (insofar as the Interstate Commerce and Elkins Acts are concerned) to credit, give, grant or pay said percentum.
>
> (a) Valuation as hereinabove used shall mean the latest final valuation of each common carrier's property owned and used for common carrier purposes as made by the Interstate Commerce Commission. To the latest final valuation of the commission shall be added the value of additions and betterments to the common carrier property made after the date of such latest final valuation, and from this sum shall be deducted appropriate amounts for physical depreciation on, and retirements of, common carrier property, computed by the carrier as of the close of the next preceding year, in accordance with the methods used by the Interstate Commerce Commission in bringing valuations down to date, the classifications of property to conform to the uniform system of accounts for pipelines prescribed by the Interstate Commerce Commission. Such valuation shall not include the value of the

common carrier facilities acquired through the investment of excess earnings transferred to and withdrawn from the surplus account as provided in paragraph V hereof.

Paragraph V of the Judgment of December 23, 1941 reads as follows:

V. Commencing January 1, 1942 each defendant common carrier shall retain (except as hereinafter provided) net earnings derived from transportation or other common carrier services in excess of the amounts permitted to be credited, granted, paid or given by paragraph III hereof and transfer such excess earnings to the surplus account within 90 days after the end of each calendar year. The said excess earnings shall be transferred to the surplus account as a separate item therein and in such a form as to be readily identifiable. The excess earnings thus transferred to the surplus account may be used by the defendant common carrier for extending existing or constructing or acquiring new common carrier facilities, for maintaining normal and reasonable working capital requirements during the current calendar year, and for retiring of any debt outstanding at the time of the entry of this judgment and decree, provided, however, that such debt or refunded debt was originally incurred for the purpose of, and the proceeds thereof expended in, constructing or acquiring common carrier property. In case of the dissolution, sale, transfer or divorcement of any defendant common carrier, any retained portion of the surplus account may be disbursed to stockholders of the corporation which owns and controls the defendant common carrier at that time.

Paragraph VIII of the Judgment of December 23, 1941 reads as follows:

VIII. Each defendant common carrier shall render a report to the Attorney General of the United

States not later than the 15th day of April of each year, showing for the preceding calendar year: the valuation used as earnings basis; total earnings available for distribution to owners or stockholders; earnings, dividends, payments or benefits credited, paid, granted or given to all stockholders or owners; and amounts of money transferred to or withdrawn from the surplus retained pursuant to paragraph V hereof.

United States of America, Appellant,

v.

The Atlantic Refining Company, et al.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 210

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATLANTIC REFINING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

The parties agree that the "controversy in this case revolves around the words 'its share' of 7% of the valuation, as used in the decree to define the permissible payment to a shipper-owner" (Br.* 13). Also apparently not disputed is "that permissible dividends to the owners of Arapahoe," if appellees' construction of the words "its share" be accepted, "would produce returns of 50% to 70% of the owners' investment" (Br. 7, fn. 6).

1. However, appellees emphasize that, despite the fact that their construction would permit such annual permissible returns to Arapahoe's shipper-owners, Arapahoe has actually paid dividends to shipper-owners of only about 1% on valuation (Br. 7); and

*References herein to "Br." are to the Appellees' brief on the merits.

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that failure to consider this fact is to ignore "one of the elementary facts of business life that dividends to the full amount permitted by earnings are not paid to stockholders * * * [p]articularly if the company has a substantial indebtedness which must be liquidated." *Ibid.*

True, Arapahoe's shipper-owners have not, as yet, chosen to take their full 70% return on investment. Equally true, however, Arapahoe's shipper-owners did receive an average of 10% on their investment, (equivalent to 1% of the pipeline's "valuation") each year by way of dividends; and they assert the right to take the added 60% claimed in a later year, as debt is paid off or "valuation" inflated, in addition to the permissible dividends for that year.[1]

Thus, appellees' construction would give Arapahoe's shipper-owners the benefit of permissible dividends twice. At the outset, permissible dividends (7% of "valuation") can be used to pay off third party debt and increase the shipper-owners' "share" in the pipeline's total capitalization. At the same time, a shipper-owner could pyramid permissible dividends (not actually paid as dividends but used to build up his "share") to increase dividends payable to him in future years even beyond the 70% presently claimed. And the increase in pipeline earning power and valu-

[1] The Government's Motion below (R. 27) alleged that Arapahoe reported permissible dividends for the year 1954 through 1956 of $3,749,748 which, after deduction of the $580,000 dividends actually paid in 1956 left a balance "payable in any subsequent year" of $3,169,748.

ation which third party debt enables heightens the promise of such ceilingless future earnings.

Defendants' construction conflicts with the scheme of Judgment Paragraph III(c). That provision specifies:

> Any amounts permitted to be * * * paid or given during any calendar year * * *, if earned and withheld may be * * * paid or given at any time thereafter in addition to credits and payments permitted during such subsequent years, *unless (i) such earned and withheld sums shall have been invested in common carrier facilities and (ii) included in valuation* * * * [Emphasis supplied.]

Arapahoe's use of permissible dividends—earnings up to 7% of valuation—to pay off debt constitutes in effect "investment" of its funds in "common carrier facilities." And these facilities are "included in valuation." Thus, Arapahoe's claim that permissible dividends for one year may be used both to pay off debt and also to add to future dividends payable to each shipper-owner runs afoul of Judgment Paragraph III(c).

Equally important, it eviscerates the Judgment's design—"to put a ceiling on the amount of dividends payable" (Br. p. 17), to serve as a "limitation on dividend payments" (Br. p. 5). This "unprecedented dividend limitation" (Br. p. 5) was meant to limit each shipper-owner's dividends to a fair return, specified as 7%, on "its share" in, or capital contribution to, the pipeline. Defendants' construction, however, would, in addition, grant each shipper-owner an equal

return on that "share" of pipeline capitalization contributed by others—that is, on loans to the pipeline made by third parties. Thus, according to defendants, when Arapahoe borrowed roughly eight times the money value of Arapahoe's stock, Arapahoe's shipper-owner's dividends could also increase eight times. This, despite the fact that Arapahoe's debt spells no new out-of-pocket capital contribution by its shipper-owners. Thus the Judgment's conceded purpose—to serve as an "unprecedented dividend limitation"—is rendered a nullity.

This anomaly is avoided under the United States' construction of "share".[2] We urge that "its share" means the proportion of each shipper-owner's capital outlay, not only to other shipper-owners' stock investments, but rather to the entire bundle of investors' rights, whether labelled stock or debt, which makes up a pipeline's capital structure. Third party debt is to be paid off, as "the elementary facts of business life" require, out of the difference between total permissible dividends (7% of valuation) and the shipper-owner's "share" thereof. As third party debt is paid off, the shipper-owner's "share" of the pipeline's total capital increases. However, it is only when third-party debt is all paid off that the shipper-owner's "share" equals 7% of valuation.

2. The "connection between the dividends paid and the shipments of any shipper" (Br. 40) is far from

[2] In the Government brief (p. 23) "share" is inadvertently defined as the ratio between the shipper-owner's capital investment in the pipeline and the latter's total *valuation*. It should refer to the relation between the shipper-owner's capital investment and the pipeline's *total invested capital*.

unreal. Thus, in 1956, the fifteen pipelines now before this Court actually paid dividends to their shipper-owners averaging 18.7% on their investments (including surplus) in the pipelines—more than two and a half times as great as the 7% return the judgment contemplated. (See Appendix A.) And viewing dividends actually paid shipper-owners (as distinguished from simply claimed as permissible) in relation to pipeline total revenue, twenty-two cents of every dollar of revenue was passed on to shipper-owners via dividends. (See Appendix B.) This means that, on their own shipments, each shipper-owner in effect paid twenty-two cents per dollar less than the nominal rate. Non-owner shippers did not receive this twenty-two cents per dollar rate benefit. Most important, twenty-two cents on each dollar in fact paid by non-owner shippers ultimately was received by the shipper-owners with whom these non-owner shippers might well compete. Thus, to the extent appellees' construction gives the shipper-owner more than a reasonable return on his "share" of the pipelines' total capital investment, it produces the very "favoritism which destroys equality between shippers" which the Elkins Act and this decree were designed to remedy. *Union Pacific R. Co. v. United States*, 313 U.S. 450, 461–462.

3. To meet these problems the Government does not seek "to rewrite the decree to conform with new theories of the application of the Elkins Act * * *" (Br. 13). Instead, the United States seeks simply to carry out the patent design of the Act, as reflected by the judgment. And that design, simply stated, was that

shipper-owners be limited to a fair and reasonable return on their "share" of, or investment in, a pipeline.[3] Only by limiting each shipper-owner to a fair return on its pipeline investment—or its "share" of the pipeline's total capitalization, equity and debt—can this judgment be squared with the Elkins Act's purpose to cover "about all the ways that thought or language can

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[3] As documents secured from Defendants' Negotiating Committee suggest, this design was articulated during the negotiations that preceded this decree. In a memorandum of a conference in Mr. Arnold's office on January 29, 1941, an industry spokesman reported:

"The rather clear inference to be drawn from Mr. Arnold's observations with respect to the pipelines is that he will start negotiations from the premise that pipeline owners who are shippers over those lines are not entitled to receive any dividends from the lines. It is possible that as negotiations proceed Mr. Arnold will admit that the pipeline owners, be they shippers or nonshippers, are entitled to receive reasonable interest on the *capital* invested in the pipelines. It may be that he will insist that the return be in the nature of interest rather than dividends." (Emphasis added.) Hearings Before the Antitrust Subcommittee (Subcommittee No. 5), House Judiciary Committee, *Consent Decree Program of the Department of Justice*, 85th Cong., 1st Sess., Part 1, p. 1327, hereinafter referred to as "Hearings."

In another memorandum dated March 6, 1941, industry negotiators observed "Obvious to A [Asbill, a government negotiator] that a reasonable rate may nevertheless cause a rebate. For purposes of settlement, just compensation for the investment, would not be considered a rebate. Anything more than just compensation is a device for a rebate." (Emphasis added.) *Id.* at p. 1395.

Further indication that the Government, at least, believed that the investment concept had been adopted in the decree appears in a letter dated March 29, 1950, written by Hammond E. Chaffetz, Esq., counsel for Service, which reported a conference with a Government representative in which the latter "said that when the decree was negotiated the Department

devise or describe to prevent the granting of discriminations in favor of one shipper as against another * * *" (H. Rep. 3765, 57th Cong., 2d Sess. p. 6).[4]

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sought to limit permissible return to 7% on the shipper-owner's investment [*sic*], and he said that there was discussion even of an exhibit to be attached to the decree setting forth the investment of each of the companies concerned. According to him, although at the industry's suggestion valuation was substituted for investment, the intention was that the valuation as of that time would be employed, subject to be modified in the event of subsequent betterments, additions, or abandonments." *Id.*, at p. 120.

On one occasion, August 27, 1951, reported in the Hearings, the Government directed an inquiry to defendant (Service) asking: "Explain your failure to deduct the principal of loans and borrowed capital from the valuation base before the 7% permissible dividend was calculated." (*Id.* p. 335.) Service replied indicating disagreement with the construction of the judgment implied in the question. (*Id.* p. 337.) The record reveals no further action by the United States.

[4] Underscoring the wisdom of this judgment's design to limit each shipper-owner's dividends to a fair return on his "share" of, or contribution to, pipeline capital is the recent Canadian Royal Commission Report which concluded:

> "30. Careful consideration has been given by the Commission to various methods of regulation and in particular to the method whereby the rates are designed to yield a fixed rate of return on the value of the assets employed, commonly referred to as a 'rate base.' Where this method is employed, except when the rate of return allowed is identical with the rate of interest on borrowed money, the net profit of the undertaking will represent, as between different companies, varying rates of return upon the shareholders' equity, depending upon the extent to which each undertaking is financed by borrowed money. Normally the allowed rate of return on assets employed exceeds the interest rate on borrowed money and, in such event, the greater the proportion of the total investment represented by borrowed money, the greater is the advantage to the equity owner in terms of the rate of return

The Government's delay in moving to effectuate this design cannot alter the proper construction of the decree. It is of paramount significance that it is a *decree*, entered by a court, which is here under review. The rights of the public cannot be lost or impaired by reason of any tardiness of a party in moving for its enforcement. The defendants' construction does not become the right construction merely because it is only now being challenged in court.

Enforcement of this decree has posed numerous and vexing problems. And, as the Chairman of defendants' Negotiating Committee wrote only one day after this decree was entered, "The negotiating committee is conscious of the fact that the Elkins Act judgment contains certain ambiguities and that various provisions must, from time to time, be construed * * *."[5]

upon his investment. Such advantage is commonly referred to as 'leverage'.

"*We are of the view that a method of regulation which permits such leverage will, in the case of oil and gas pipe line companies, tend to produce an undesirable disparity between the several companies in the rate of return upon equity. It may also make possible realization of inordinate profits which, in the last analysis, will be paid by the consuming public.* In this respect we have in mind particularly situations where shares in the equity have been issued to shareholders at prices varying from a few cents to substantially higher amounts.

"The Commission is therefore of the view that the best basis of regulation to be followed with respect to pipe line companies, subject to the jurisdiction of the Parliament of Canada, is that method of regulation which *ensures a fair rate of return on the shareholders' equity* and does not permit the leverage to which we have above referred." (Dominion of Canada, Royal Commission on Energy, First Report, October 1958, Chap. 2, pp. 19–20; emphasis added.)

[5] Hearings, p. 1648.

Only as the years passed, and the ratio between defendant pipelines' debt to equity shifted so drastically, has the issue now posed before this Court appeared in its true dimensions.[6] In these circumstances, any Government delay cannot deprive the shipping public of those *future* benefits from nondiscriminatory oil transport which the decree from its beginning was intended to provide.

Respectfully submitted.

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APRIL 1959.

[6] See Appendix C. Viewing the 11 of the 15 pipeline companies now before this Court that existed in 1940, their 1940 ratio of funded debt to capital stock was less than 1 to 100. Now, the ratio of funded debt to capital stock of the 15 pipelines before this Court is more than 2 to 1.

APPENDIX A

Distributable shipper-owner dividends under defendants' construction of consent decree, and dividends actually paid, as percent of capital stock plus surplus: Data for 15 defendants-parties in interest

Pipe Line	1956								
	I.C.C. Valuation	I.C.C. Valuation (Adjusted)	Permissible Dividends, Distributable under Defendants' Construction	Dividends Paid	Capital Stock	Surplus	Capital Stock Plus Surplus	Permissible Dividends as Percent of Capital Stock plus Surplus	Dividends Paid as Percent of Capital Stock Plus Surplus
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Arapahoe P.L. Co	$24,651,700	$30,136,700	$2,109,569	$580,000	$2,900,000	$3,344,503	$6,244,503	33.8%	9.3%
Cities Service P.L. Co	20,685,600	20,685,600	1,447,992	1,125,000	4,500,000	2,162,183	6,662,183	21.7	16.9
Continental P.L. Co	23,615,100	23,615,100	1,653,057	0	500,000	14,566,187	15,066,187	11.0	.0
Great Lakes P.L. Co	121,976,800	111,128,155	7,778,971	7,410,042	2,470,014	30,039,701	32,509,715	23.9	22.8
Humble P.L. Co	117,764,700	117,764,700	8,243,529	*10,000,000	50,000,000	8,854,083	58,854,083	14.0	17.0
Interstate Oil P.L. Co	52,689,900	50,681,989	3,547,739	4,040,260	20,201,000	3,863,196	24,064,196	14.7	16.8
Magnolia P.L. Co	125,563,100	125,563,100	8,789,417	8,745,000	16,500,000	16,038,748	32,538,748	27.0	26.9
Plantation P.L. Co	75,130,800	75,081,973	5,255,738	5,227,500	12,750,000	10,130,426	22,880,426	23.0	22.8
Service P.L. Co	190,454,900	191,254,833	13,387,838	13,441,065	32,584,400	41,157,479	73,741,879	18.2	18.2
Shell P.L. Corp	98,232,087	98,450,000	6,891,500	*7,200,000	6,649,977	47,212,725	53,862,702	12.8	13.4
Sinclair P.L. Co	151,514,500	151,966,586	10,637,661	*11,623,068	41,100,000	33,744,774	74,844,774	14.2	15.5
Texaco-Cities Service P.L. Co	38,249,900	31,019,287	2,171,350	1,950,000	3,000,000	11,936,078	14,936,078	14.5	13.1
Texas-New Mexico P.L. Co	35,755,800	33,381,899	2,336,733	1,200,000	12,000,000	10,459,927	22,459,927	10.4	5.3
Texas P.L. Co	123,575,700	123,013,297	8,610,931	*18,000,000	26,000,000	20,141,362	46,141,362	18.7	39.0
Tuscarora P.L. Co	9,522,100	9,522,100	666,547	575,000	2,300,000	487,830	2,787,830	23.9	20.6
Total—15 Companies	1,209,412,637	1,193,265,319	83,528,572	91,116,875	233,455,391	254,130,202	487,594,593		
Average—15 Companies								17.1	18.7

*Includes amounts earned and distributable, but not paid out, in earlier years.

Sources:

Col. (1): 55 I.C.C. Valuation Reports, April 1955–January 1957.

Col. (2): I.C.C. Valuation adjusted as necessary by each defendant to reflect the requirements of the Consent Decree.

Col. (3): 7% of Col. (2).

Col. (4): Interstate Commerce Commission, *Transport Statistics in the United States*, 1956, Part 6, Oil Pipe Lines, Table 13, p. 32. Dividends for Shell and Sinclair from their reports to Attorney General.

Col. (5): *Ibid.*, Table 9, pp. 18–19.

Col. (6): *Ibid.*, Table 8, pp. 16–17.

Col. (7): Col. (5) plus Col. (6).

Col. (8): Col. (3) divided by Col. (7).

Col. (9): Col. (4) divided by Col. (7).

APPENDIX B

Portion of each dollar of pipeline revenue distributable, and portion actually distributed to shipper-owners as dividends under defendants' construction of consent decree: Data for 15 defendants—parties in interest

	1956						
	Pipeline Revenues	I.C.C. Valuation	I.C.C. Valuation (Adjusted)	Permissible Dividends, Distributable under Defendants' Construction	Permissible Dividends Per Dollar of Pipeline Revenue	Dividends Paid	Dividends Paid Per Dollar Of Pipeline Revenue
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Arapahoe P.L. Co.	$7,770,037	$24,681,700	$30,136,700	$2,109,569	$0.272	$580,000	$0.075
Cities Service P.L. Co.	8,732,053	20,685,600	20,685,600	1,447,992	.166	1,125,000	.129
Continental P.L. Co.	7,975,368	23,615,100	23,615,100	1,653,057	.207	0	0
Great Lakes P.L. Co.	41,947,941	121,976,800	111,128,155	7,778,971	.185	*7,410,042	.177
Humble P.L. Co.	42,360,299	117,764,700	117,764,700	8,243,529	.195	*10,000,000	.236
Interstate Oil P.L. Co.	22,369,277	52,689,900	50,681,989	3,547,739	.159	4,040,200	.181
Magnolia P.L. Co.	41,683,431	125,563,100	125,563,100	8,789,417	.211	8,745,000	.210
Plantation P.L. Co.	27,435,433	75,130,800	75,081,973	5,255,738	.192	5,227,500	.190
Service P.L. Co.	60,380,874	190,454,900	191,254,833	13,387,838	.222	13,441,065	.223
Shell P.L. Corp.	35,953,172	98,232,037	98,450,000	6,891,500	.192	*7,200,000	.200
Sinclair P.L. Co.	49,943,687	151,514,500	151,966,586	10,637,661	.213	*11,623,068	.233
Texaco-Cities Service P.L. Co.	9,951,319	38,249,900	31,019,287	2,171,350	.218	1,950,000	.196
Texas-New Mexico P.L. Co.	12,131,374	35,755,800	33,381,899	2,336,733	.193	1,200,000	.099
Texas P.L. Co.	41,911,183	123,575,760	123,013,297	8,610,931	.205	*18,000,000	.429
Tuscarora P.L. Co.	1,935,083	9,522,100	9,522,100	666,547	.344	575,000	.297
Total—15 Companies	412,480,831	1,209,412,637	1,193,265,319	83,528,572		91,116,875	
Average—15 Companies					.203		.221

*Includes amounts earned and distributable, but not paid out, in earlier years.

Sources:

Col. (1): Interstate Commerce Commission, *Transport Statistics In The United States*, 1956, Part 6, Oil Pipe Lines, Table 11, pp. 24–27.

Col. (2): 55 I.C.C. Valuation Reports, April 1955–January 1957.

Col. (3): I.C.C. Valuation adjusted as necessary by each defendant to reflect the provisions of the Consent Decree.

Col. (4): 7% of Col. (3).

Col. (5): Col. (4) divided by Col. (1).

Col. (6): I.C.C. *Transport Statistics In The United States*, 1956, Part 6, Oil Pipe Lines, Table 13, p. 32. Dividends for Shell and Sinclair from their reports to Attorney General.

Col. (7): Col. (6) divided by Col. (1).

APPENDIX C

*Growth of funded debt in relation to capital stock: 15 defendants—parties in interest**

1940-1956

Year	Funded Debt (1)	Capital Stock (2)	Ratio of Funded Debt To Capital Stock (3)
1940	$1,600,000	$176,456,677	0.9%
1941	14,142,908	176,456,677	8.0
1942	37,749,939	182,454,391	20.7
1943	32,979,069	189,954,391	17.4
1944	26,657,000	185,954,391	14.3
1945	35,464,000	196,354,391	18.1
1946	43,592,500	187,315,491	23.3
1947	93,313,000	187,315,491	49.8
1948	171,650,000	187,315,491	91.6
1949	258,559,000	187,315,491	138.0
1950	298,346,333	187,315,491	159.3
1951	329,182,001	229,215,491	143.6
1952	487,096,667	229,215,491	212.5
1953	480,932,333	230,032,491	209.1
1954	520,489,667	233,455,391	223.0
1955	514,528,889	233,455,391	220.4
1956	513,948,611	233,830,391	219.8

*The table covers the following 11 companies for 1940-41: Cities Service P.L. Co.; Continental P.L. Co.; Great Lakes P.L. Co.; Humble P.L. Co.; Magnolia P.L. Co.; Service P.L. Co.; Shell P.L. Corp.; Texaco-Cities Service P.L. Co.; Texas-New Mexico P.L. Co.; Texas P.L. Co.; and Tuscarora P.L. Co. Additional companies were included as follows in later years: Plantation P.L.Co., 1942; Interstate Oil P.L. Co., 1943; Sinclair P.L. Co., 1951; and Arapahoe P. L. Co. in 1954.

Source:

Cols. (1) and (2): Compiled from I.C.C. *Transport Statistics in the United States*, Part 6, Oil Pipe Lines, 1955, 1956; I.C.C. *Statistics of Oil Pipe Line Companies*, 1940-1954.

Col. (3): Computed by dividing Column (1) by Column (2).

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